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A DISCOURSE

ON

THE STUDY

OF THE

LAW OF NATURE AND NATIONS.

BY THE

RIGHT HON. SIR JAMES MACKINTOSH.

EDINBURGH:
THOMAS CLARK, 38 GEORGE STREET.
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A BRIEF NOTICE

OF

THE AUTHOR.

Sir James Mackintosh was born on the 24th October 1765, at Aldourie, in the county of Inverness. He received the rudiments of his education at the school of Fortrose in Ross-shire, thence he removed to King's College, Aberdeen, and gave at both of these places an earnest of his future eminence. At the University above named he formed an acquaintance with the celebrated Robert Hall, which continued during life. Having been destined by his friends for the profession of a physician, he entered the University of Edinburgh at the age of twenty, where he took his degree of M. D. in September 1787.

In 1788 he went to London, and there married Miss Stuart about a year after. In 1789 he published a pamphlet on the Regency question, but as Mr Pitt's theory on the subject triumphed over that of Fox, the pamphlet shared the fate of the cause which it espoused. His Vindiciæ Gallicæ, which appeared in 1791, passed through three editions in the short space of six months, and by the talents displayed in it procured for the author the acquaintance of Sheridan, Grey, Whitbread, Fox, and the Duke of Bedford. He renounced the medical profession, and in 1792 entered student of law in Lincoln's-Inn, and was called to the bar in 1795. Having resolved to give a course of lectures on the Law of Nature and Nations, he announced his intention by a prospectus in 1797, and, accordingly, delivered in 1798 in Lincoln's-Inn Hall his introductory lecture, which was

published in 1799. The ability and sound principle displayed in it secured universal approbation; not only did Fox and his friends lavish their praises on the author, but even Lords Rosslyn and Melville, Mr Adington, Mr Canning, and Mr Pitt himself, wrote him letters of compliment. The latter statesman, then a bencher of Lincoln's-Inn, thus addressed him:—"I have no motive for wishing to flatter you; but I must be permitted to say, that I have never met with any thing so able and elegant on the subject in any language." Members of the Government were among his chief admirers and eulogists. No course of lectures was remembered to have found an audience so distinguished. About thirty peers, double the number of commoners, and a great crowd of the most learned and accomplished persons of the metropolis, were attracted to Lincoln's-Inn Hall. This is not to be wondered at, since the lecture is equally profound in thought, extensive in its range of information, and superior, perhaps, in method and order to any thing which he has produced.

The course, of which the present publication forms the Introductory Lecture, not only established the author's reputation, but opened up the way for him to fortune. Of the succeeding lectures it is said that only the notes or heads from which he delivered them remain.

"If," says his friend Mr Thomas C[illegible] had published nothing else than this D[illegible] Law of Nature and Nations, he would h[illegible] fect monument of his intellectual strength and symmetry; and even supposing that that essay had been recovered only imperfect and mutilated, if but a score of its consecutive sentences could have been shown, they would bear a testimony to his genius as decided as the bust of Theseus bears to Grecian art amidst the Elgin marbles."

His death, which happened on the 30th May 1832, excited deep and universal regret.

In literature, in politics, and in social life, he was one of the most distinguished ornaments of his country.

EDINBURGH, *October* 1835,
38 GEORGE STREET.

A DISCOURSE

ON THE

LAW OF NATURE AND NATIONS.

BEFORE I begin a course of lectures on a science of great extent and importance, I think it my duty to lay before the public the reasons which have induced me to undertake such a labour, as well as a short account of the nature and objects of the course which I propose to deliver. I have always been unwilling to waste in unprofitable inactivity that leisure which the first years of my profession usually allow, and which diligent men, even with moderate talents, might often employ in a manner neither discreditable to themselves, nor wholly useless to others. Desirous that my own leisure should not be consumed in sloth, I anxiously looked about for some way of filling it up, which might enable me, according to the measure of my humble abilities, to contribute somewhat to the stock of general usefulness. I had long been convinced that public lectures, which have been used in most ages and countries to teach the elements of almost every part of learning, were the most convenient

mode in which these elements could be taught; that they were the best adapted for the important purposes of awakening the attention of the student, of abridging his labours, of guiding his inquiries, of relieving the tediousness of private study, and of impressing on his recollection the principles of science. I saw no reason why the Law of England should be less adapted to this mode of instruction, or less likely to benefit by it, than any other part of knowledge. A learned gentleman, however, had already occupied that ground,* and will, I doubt not, persevere in the useful labour which he has undertaken. On his province it was far from my wish to intrude. It appeared to me that a course of lectures on another science closely connected with all liberal professional studies, and which had long been the subject of my own reading and reflection, might not only prove a most useful introduction to the law of England, but might also become an interesting part of general study, and an important branch of the education of those who were not destined for the profession of the law. I was confirmed in my opinion by the assent and approbation of men, whose names, if it were becoming to mention them on so slight an occasion, would add authority to truth, and furnish some excuse even for error. Encouraged by their approbation, I resolved without delay to commence the undertaking, of which I shall now proceed to give some account; without inter-

* See "A Syllabus of Lectures on the Law of England, to be delivered in Lincoln's-Inn Hall by M Nolan, Esq." London, 1796.

rupting the progress of my discourse by anticipating or answering the remarks of those who may, perhaps, sneer at me for a departure from the usual course of my profession; because I am desirous of employing in a rational and useful pursuit that leisure, of which the same men would have required no account, if it had been wasted on trifles, or even abused in dissipation.

The science which teaches the rights and duties of men and of states, has, in modern times, been called the Law of Nature and Nations. Under this comprehensive title are included the rules of morality, as they prescribe the conduct of private men towards each other in all the various relations of human life; as they regulate both the obedience of citizens to the laws, and the authority of the magistrate in framing laws and administering government; as they modify the intercourse of independent commonwealths in peace, and prescribe limits to their hostility in war. This important science comprehends only that part of *private ethics* which is capable of being reduced to fixed and general rules. It considers only those general principles of *jurisprudence* and *politics* which the wisdom of the lawgiver adapts to the peculiar situation of his own country, and which the skill of the statesman applies to the more fluctuating and infinitely varying circumstances which affect its immediate welfare and safety. "For there are in nature certain fountains of justice whence all civil laws are derived, but as streams; and like as waters do take tinctures and tastes from the soils through which they run, so do civil laws vary according to the regions

and governments where they are planted, though they proceed from the same fountains."*—*Bacon's Dig. and Adv. of Learn.* Works, vol. i. p. 101.

On the great questions of morality, of politics, and of municipal law, it is the object of this science to deliver only those fundamental truths of which the particular application is as extensive as the whole private and public conduct of men; to discover those "fountains of justice," without pursuing the "streams" through the endless variety of their course. But another part of the subject is treated with greater fulness and minuteness of application; namely, that important branch of it which professes to regulate the relations and intercourse of states, and more especially, both on account of their greater perfection and their more immediate reference to use, the regulations of that intercourse as they are modified by the usages of the civilized nations of Christendom. Here this science no longer rests in general principles. That province of it which we now call the law of nations, has, in many of its parts, acquired among our European nations much of the precision and certainty of positive law, and the particulars of that law are chiefly to be found in the works of those writers who have treated the science of which I now speak. It is because they have classed (in a manner which seems peculiar to modern times) the duties of individuals

* I have not been deterred by some petty incongruity of metaphor from quoting this noble sentence. Mr Hume had, perhaps, this sentence in his recollection, when he wrote a remarkable passage of his works. See Hume's Essays, vol. ii. p. 352, ed. Lond. 1788.

with those of nations, and established their obligation on similar grounds, that the whole science has been called, "The Law of Nature and Nations."

Whether this appellation be the happiest that could have been chosen for the science, and by what steps it came to be adopted among our modern moralists and lawyers,* are inquiries, perhaps, of more curiosity than use, and which, if they deserve any where to be deeply pursued, will be pursued with more propriety in a full examination of the subject than within the short limits of an introductory discourse. Names are, however, in a great measure arbitrary; but the distribution of knowledge into its parts, though it may often perhaps be varied with little disadvantage, yet certainly depends upon some fixed principles. The

* The learned reader is aware that the "jus naturæ" and "jus gentium" of the Roman lawyers are phrases of very different import from the modern phrases, "law of nature" and "law of nations." "Jus naturale," says Ulpian, "est quod natura omnia animalia docuit." D. 1. 1. 1. 3. "Quod naturalis ratio inter omnes homines constituit, id apud omnes peræque custoditur; vocaturque jus gentium." D. 1. 1. 9. But they sometimes neglect this subtle distinction—"Jure naturali quod appellatur jus gentium." I. 2. 1. 11. *Jus feciale* was the Roman term for our law of nations. "Belli quidem æquitas sanctissimè populi Rom. feciali jure perscripta est." Off. 1. 11. Our learned civilian Zouch has accordingly entitled his work, "De Jure Feciali, sive de Jure *inter* Gentes." The Chancellor D'Aguesseau, probably without knowing the work of Zouch, suggested that this law should be called, "*Droit entre les Gens*" (Œuvres, tom. ii. p. 337), in which he has been followed by a late ingenious writer, Mr Bentham, Princ. of Morals and Pol. p. 324. Perhaps these learned writers do employ a phrase which expresses the subject of this law with more accuracy than our common language; but I doubt whether innovations in the terms of science always repay us by their superior precision for the uncertainty and confusion which the change occasions.

modern method of considering individual and national morality as the subjects of the same science, seems to me as convenient and reasonable an arrangement as can be adopted. The same rules of morality which hold together men in families, and which form families into commonwealths, also link together these commonwealths as members of the great society of mankind. Commonwealths, as well as private men, are liable to injury, and capable of benefit, from each other; it is, therefore, their interest, as well as their duty, to reverence, to practise, and to enforce those rules of justice which control and restrain injury, which regulate and augment benefit, which, even in their present imperfect observance, preserve civilized states in a tolerable condition of security from wrong, and which, if they could be generally obeyed, would establish, and permanently maintain, the well-being of the universal commonwealth of the human race. It is therefore with justice, that one part of this science has been called "*the natural law of individuals*," and the other "*the natural law of states*;" and it is too obvious to require observation,* that the application of both these laws, of the former as much as of the latter, is modified and varied by customs, conventions, character, and situation. With a view to these principles, the writers on general jurisprudence have considered states as moral persons; a mode of expression which has been called a fiction of law, but which may be regarded with more propriety as a bold metaphor,

* This remark is suggested by an objection of *Vattel*, which is more specious than solid. See his Prelim. § 6.

used to convey the important truth, that nations, though they acknowledge no common superior, and neither can nor ought to be subjected to human punishment, are yet under the same obligations mutually to practise honesty and humanity, which would have bound individuals, even if they could be conceived ever to have subsisted without the protecting restraints of government; if they were not compelled to the discharge of their duty by the just authority of magistrates, and by the wholesome terrors of the laws. With the same views this law has been styled, and (notwithstanding the objections of some writers to the vagueness of the language) appears to have been styled with great propriety, "the law of nature." It may with sufficient correctness, or at least by an easy metaphor, be called a "*law*," inasmuch as it is a supreme, invariable, and uncontrollable rule of conduct to all men, of which the violation is avenged by natural punishments, which necessarily flow from the constitution of things, and are as fixed and inevitable as the order of nature. It is "*the law of nature*," because its general precepts are essentially adapted to promote the happiness of man, as long as he remains a being of the same nature with which he is at present endowed, or, in other words, as long as he continues to be man, in all the variety of times, places, and circumstances, in which he has been known, or can be imagined to exist; because it is discoverable by natural reason, and suitable to our natural constitution; because its fitness and wisdom are founded on the general nature of human beings, and not on any of those temporary and accidental situations in

which they may be placed. It is with still more propriety, and indeed with the highest strictness, and the most perfect accuracy, considered as a law, when, according to those just and magnificent views which philosophy and religion open to us of the government of the world, it is received and reverenced as the sacred code, promulgated by the great Legislator of the Universe for the guidance of his creatures to happiness, guarded and enforced, as our own experience may inform us, by the penal sanctions of shame, of remorse, of infamy, and of misery; and still farther, enforced by the reasonable expectation of yet more awful penalties in a future and more permanent state of existence. It is the contemplation of the law of nature under this full, mature, and perfect idea of its high origin and transcendent dignity, that called forth the enthusiasm of the greatest men, and the greatest writers of ancient and modern times, in those sublime descriptions, where they have exhausted all the powers of language, and surpassed all the other exertions, even of their own eloquence, in the display of the beauty and majesty of this sovereign and immutable law. It is of this law that Cicero has spoken in so many parts of his writings, not only with all the splendour and copiousness of eloquence, but with the sensibility of a man of virtue; and with the gravity and comprehension of a philosopher.* It is of this law that Hooker speaks in so sublime a strain:—"Of law, no less can be said, than that her seat is the bosom

* "Est quidem vera lex, recta ratio, *naturæ congruens*, diffusa in omnes, constans, sempiterna, quæ vocet ad officium jubendo, vetando à fraude deterreat, quæ tamen neque probos frustra jubet aut

of God, her voice the harmony of the world; all things in heaven and earth do her homage, the very least as feeling her care, the greatest as not exempted from her power; both angels and men, and creatures of what condition soever, though each in different sort and manner, yet all with uniform consent admiring her as the mother of their peace and joy."—*Eccles. Pol.* book i. in the conclusion.

Let not those, who, to use the language of the same Hooker, "talk of truth," without "ever sounding the depth from whence it springeth," hastily take it for granted, that these great masters of eloquence and reason were led astray by the specious delusions of mysticism, from the sober consideration of the true grounds of morality in the nature, necessities, and interests of man. They studied and taught the principles of morals; but they thought it still more neces-

vetat, neque improbos jubendo aut vetando movet. Huic legi neque obrogari fas est, neque derogari ex hac aliquid licet, neque tota abrogari potest. Nec verò aut per senatum aut per populum solvi hac lege possumus. Neque est quærendus explanator aut interpres ejus alius. Nec erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna, et immutabilis continebit, unusque erit communis quasi magister et imperator omnium Deus. Ille legis hujus inventor, disceptator, lator, cui qui non parebit *ipse se fugiet et naturam hominis aspernabitur*, atque hoc ipso luet maximas pœnas etiamsi cætera supplicia quæ putantur effugerit."—*Fragm.* lib. iii. *Cicer. de Republ. apud Lactant.*

It is impossible to read such precious fragments without deploring the loss of a work which, for the benefit of all generations, *should* have been immortal.

[It is scarcely necessary to remind the reader, that the cause of this regret has been, if not entirely removed, at least greatly diminished, in the discovery of Dr Maius of a MS. of this precious work in the Vatican. Several editions have been edited by different Continental scholars.]

sary, and more wise, a much nobler task, and more becoming a true philosopher, to inspire men with a love and reverence for virtue.* They were not contented with elementary speculations. They examined the foundations of our duty, but they felt and cherished a most natural, a most seemly, a most rational enthusiasm, when they contemplated the majestic edifice which is reared on these solid foundations. They devoted the highest exertions of their mind to spread that beneficent enthusiasm among men. They consecrated as a homage to virtue the most perfect fruits of their genius. If these grand sentiments of "the good and fair" have sometimes prevented them from delivering the principles of ethics with the nakedness and dryness of science, at least, we must own that they have chosen the better part; that they have preferred virtuous feeling to moral theory; and practical benefit to speculative exactness. Perhaps these wise men may have supposed that the minute dissection and anatomy of Virtue might, to the ill-judging eye, weaken the charm of her beauty.

It is not for me to attempt a theme which has perhaps been exhausted by these great writers. I am indeed much less called upon to display the worth and usefulness of the law of nations, than to vindicate myself from presumption in attempting a subject which has been already handled by so many masters.

* "Age verò urbibus constitutis ut fidem colere et justitiam retinere discerent et aliis parere suâ voluntate consuescerent, ac non modò labores excipiendos communis commodi causâ sed etiam vitam amittendam existimarent; qui tandem fieri potuit nisi homines ea quæ ratione invenissent, eloquentiâ persuadere potuissent?"—*Cic. de Inv. Rhet.* lib. i. in proëm.

For the purpose of that vindication it will be necessary to sketch a very short and slight account (for such in this place it must unavoidably be) of the progress and present state of the science, and of that succession of able writers who have gradually brought it to its present perfection.

We have no Greek or Roman treatise remaining on the law of nations. From the title of one of the lost works of Aristotle, it appears that he composed a treatise on the laws of war,* which, if we had the good fortune to possess it, would doubtless have amply satisfied our curiosity, and would have taught us both the practice of the ancient nations and the opinions of their moralists, with that depth and precision which distinguish the other works of that great philosopher. We can now only imperfectly collect that practice and those opinions from various passages which are scattered over the writings of philosophers, historians, poets, and orators. When the time shall arrive for a more full consideration of the state of the government and manners of the ancient world, I shall be able, perhaps, to offer satisfactory reasons why these enlightened nations did not separate from the general province of ethics that part of morality which regulates the intercourse of states, and erect it into an independent science. It would require a long discussion to unfold the various causes which united the modern nations of Europe into a closer society; which linked them together by the firmest bands of mutual dependence, and which thus, in process of time,

* Δικαιώματα τῶν πολέμων.

gave to the law that regulated their intercourse greater importance, higher improvement, and more binding force. Among these causes we may enumerate a common extraction, a common religion, similar manners, institutions, and languages; in earlier ages the authority of the See of Rome, and the extravagant claims of the imperial crown; in later times the connexions of trade, the jealousy of power, the refinement of civilization, the cultivation of science, and, above all, that general mildness of character and manners which arose from the combined and progressive influence of chivalry, of commerce, of learning, and of religion. Nor must we omit the similarity of those political institutions which, in every country that had been over-run by the Gothic conquerors, bore discernible marks (which the revolutions of succeeding ages had obscured, but not obliterated) of the rude but bold and noble outline of liberty that was originally sketched by the hand of these generous barbarians. These and many other causes conspired to unite the nations of Europe in a more intimate connexion and a more constant intercourse, and of consequence made the regulation of their intercourse more necessary, and the law that was to govern it more important. In proportion as they approached to the condition of provinces of the same empire, it became almost as essential that Europe should have a precise and comprehensive code of the law of nations, as that each country should have a system of municipal law. The labours of the learned accordingly began to be directed to this subject in the six-

teenth century, soon after the revival of learning, and after that regular distribution of power and territory which has subsisted, with little variation, until our times. The critical examination of these early writers would perhaps not be very interesting in an extensive work, and it would be unpardonable in a short discourse. It is sufficient to observe that they were all more or less shackled by the barbarous philosophy of the schools, and that they were impeded in their progress by a timorous deference for the inferior and technical parts of the Roman law, without raising their views to the comprehensive principles which will for ever inspire mankind with veneration for that grand monument of human wisdom. It was only indeed in the sixteenth century that the Roman law was first studied and understood as a science connected with Roman history and literature, and illustrated by men whom Ulpian and Papinian would not have disdained to acknowledge as their successors.* Among the writers of that age we may perceive the ineffectual attempts, the partial advances, the occasional streaks of light which always precede great discoveries, and works that are to instruct posterity.

The reduction of the law of nations to a system was reserved for Grotius. It was by the advice of Lord Bacon and Peiresc that he undertook this arduous task. He produced a work which we now indeed

* Cujacius, Brissonius, Hottomannus, &c., &c.—Vide *Gravina Orig. Jur. Civil.* pp. 132–38. edit Lips. 1737.

Leibnits, a great mathematician as well as philosopher, declares that he knows nothing which approaches so near to the method and precision of geometry as the Roman law.—*Op.* tom. iv. p. 254.

justly deem imperfect, but which is perhaps the most complete that the world has yet owed, at so early a stage in the progress of any science, to the genius and learning of one man. So great is the uncertainty of posthumous reputation, and so liable is the fame even of the greatest men to be obscured by those new fashions of thinking and writing which succeed each other so rapidly among polished nations, that Grotius who filled so large a space in the eye of his contemporaries, is now perhaps known to some of my readers only by name. Yet if we fairly estimate both his endowments and his virtues, we may justly consider him as one of the most memorable men who have done honour to modern times. He combined the discharge of the most important duties of active and public life with the attainment of that exact and various learning which is generally the portion only of the recluse student. He was distinguished as an advocate and a magistrate, and he composed the most valuable works on the law of his own country; he was almost equally celebrated as a historian, a scholar, a poet, and a divine; a disinterested statesman, a philosophical lawyer, a patriot who united moderation with firmness, and a theologian who was taught candour by his learning. Unmerited exile did not damp his patriotism; the bitterness of controversy did not extinguish his charity. The sagacity of his numerous and fierce adversaries could not discover a blot on his character; and in the midst of all the hard trials and galling provocations of a turbulent political life, he never once deserted his friends when they were un-

fortunate, nor insulted his enemies when they were weak. In times of the most furious civil and religious faction he preserved his name unspotted, and he knew how to reconcile fidelity to his own party, with moderation towards his opponents. Such was the man who was destined to give a new form to the law of nations, or rather to create a science, of which only rude sketches and indigested materials were scattered over the writings of those who had gone before him. By tracing the laws of his country to their principles, he was led to the contemplation of the law of nature, which he justly considered as the parent of all municipal law.* Few works were more celebrated than that of Grotius in his own days, and in the age which succeeded. It has, however, been the fashion of the last half-century to depreciate his work as a shapeless compilation, in which reason lies buried under a mass of authorities and quotations. This fashion originated among French wits and declaimers, and it has been, I know not for what reason, adopted, though with far greater moderation and decency, by some respectable writers among ourselves. As to those who first used this language, the most candid supposition that we can make with respect to them is, that they never read the work; for, if they had not been deterred from the perusal of it by such a formidable display of Greek characters, they must soon have discovered that Grotius never quotes on any subject till he has first appealed to some principles,

* Proavia juris civilis.—*De Jur. Bell. ac Pac. Proleg.* § 16.

and often, in my humble opinion, though not always, to the soundest and most rational principles.

But another sort of answer is due to some of those* who have criticised Grotius, and that answer might be given in the words of Grotius himself.† He was not of such a stupid and servile cast of mind, as to quote the opinions of poets or orators, of historians and philosophers, as those of judges, from whose decision there was no appeal. He quotes them, as he tells us himself, as witnesses whose conspiring testimony, mightily strengthened and confirmed by their discordance on almost every other subject, is a conclusive proof of the unanimity of the whole human race on the great rules of duty and the fundamental principles of morals. On such matters, poets and orators are the most unexceptionable of all witnesses; for they address themselves to the general feelings and sympathies of mankind; they are neither warped by system, nor perverted by sophistry; they can attain none of their objects, they can neither please nor persuade, if they dwell on moral sentiments not in unison with those of their readers. No system of moral philosophy can surely disregard the general feelings of human nature and the according judgment of all ages and nations. But where are these feelings and that judgment recorded and preserved? In those very writings which Grotius is gravely blamed for having quoted. The usages and laws of nations,

* Dr Paley, Princ. of Mor. and Polit. Philos. Pref. pp. xiv. and xv.

† Grot. Jur. Bell. et Pac. Proleg. § 40.

the events of history, the opinions of philosophers, the sentiments of orators and poets, as well as the observation of common life, are, in truth, the materials out of which the science of morality is formed; and those who neglect them are justly chargeable with a vain attempt to philosophise without regard to fact and experience, the sole foundation of all true philosophy.

If this were merely an objection of taste, I should be willing to allow that Grotius has indeed poured forth his learning with a profusion that sometimes rather encumbers than adorns his work, and which is not always necessary to the illustration of his subject. Yet, even in making that concession, I should rather yield to the taste of others than speak from my own feelings. I own that such richness and splendour of literature have a powerful charm for me. They fill my mind with an endless variety of delightful recollections and associations. They relieve the understanding in its progress through a vast science, by calling up the memory of great men and of interesting events. By this means we see the truths of morality clothed with all the eloquence (not that could be produced by the powers of one man, but) that could be bestowed on them by the collective genius of the world. Even Virtue and Wisdom themselves acquire new majesty in my eyes, when I thus see all the great masters of thinking and writing called together, as it were, from all times and countries, to do them homage, and to appear in their train.

But this is no place for discussions of taste, and I

am very ready to own that mine may be corrupted. The work of Grotius is liable to a more serious objection, though I do not recollect that it has ever been made. His method is inconvenient and unscientific. He has inverted the natural order. That natural order undoubtedly dictates, that we should first search for the original principles of the science in human nature; then apply them to the regulation of the conduct of individuals; and lastly, employ them for the decision of those difficult and complicated questions that arise with respect to the intercourse of nations. But Grotius has chosen the reverse of this method. He begins with the consideration of the states of peace and war, and he examines original principles only occasionally and incidentally as they grow out of the questions which he is called upon to decide. It is a necessary consequence of this disorderly method, which exhibits the elements of the science in the form of scattered digressions, that he seldom employs sufficient discussion on these fundamental truths, and never in the place where such a discussion would be most instructive to the reader.

This defect in the plan of Grotius was perceived, and supplied, by Puffendorff, who restored natural law to that superiority which belonged to it, and with great propriety treated the law of nations as only one main branch of the parent stock. Without the genius of his master, and with very inferior learning, he has yet treated this subject with sound sense, with clear method, with extensive and accurate knowledge, and with a copiousness of detail sometimes indeed tedious,

but always instructive and satisfactory. His work will be always studied by those who spare no labour to acquire a deep knowledge of the subject; but it will, in our times, I fear, be oftener found on the shelf than on the desk of the general student. In the time of Mr Locke it was considered as the manual of those who were intended for active life; but in the present age, I believe it will be found that men of business are too much occupied, men of letters are too fastidious, and men of the world too indolent, for the study or even the perusal of such works. Far be it from me to derogate from the real and great merit of so useful a writer as Puffendorff. His treatise is a mine in which all his successors must dig. I only presume to suggest, that a book so prolix, and so utterly void of all the attractions of composition, is likely to repel many readers who are interested, and who might perhaps be disposed to acquire some knowledge of the principles of public law.

Many other circumstances might be mentioned, which conspire to prove that neither of the great works of which I have spoken, has superseded the necessity of a new attempt to lay before the public a System of the Law of Nations. The language of science is so completely changed since both these works were written, that whoever was now to employ their terms in his moral reasonings would be almost unintelligible to some of his hearers or readers; and to some among them too who are neither ill qualified nor ill disposed to study such subjects with considerable advantage to themselves. The learned indeed well know how little

novelty or variety is to be found in scientific disputes. The same truths and the same errors have been repeated from age to age, with little variation but in the language; and novelty of expression is often mistaken by the ignorant for substantial discovery. Perhaps too very nearly the same portion of genius and judgment has been exerted in most of the various forms under which science has been cultivated at different periods of history. The superiority of those writers who continue to be read, perhaps often consists chiefly in taste, in prudence, in a happy choice of subject, in a favourable moment, in an agreeable style, in the good fortune of a prevalent language, or in other advantages which are either accidental, or are the result rather of the secondary than of the highest faculties of the mind.—But these reflections, while they moderate the pride of invention, and dispel the extravagant conceit of superior illumination, yet serve to prove the use, and indeed the necessity, of composing, from time to time, new systems of science adapted to the opinions and language of each succeeding period. Every age must be taught in its own language. If a man were now to begin a discourse on ethics with an account of the "*moral entities*" of Puffendorff,* he would speak an unknown tongue.

It is not, however, alone as a mere translation of

* I do not mean to impeach the soundness of any part of Puffendorff's reasoning founded on moral entities. It may be explained in a manner consistent with the most just philosophy. He used, as every writer must do, the scientific language of his own time. I only assert that, to those who are unacquainted with ancient systems, his philosophical vocabulary is obsolete and unintelligible.

former writers into modern language that a new system of public law seems likely to be useful. The age in which we live possesses many advantages which are peculiarly favourable to such an undertaking. Since the composition of the great works of Grotius and Puffendorff, a more modest, simple, and intelligible philosophy has been introduced into the schools; which has indeed been grossly abused by sophists, but which, from the time of Locke, has been cultivated and improved by a succession of disciples worthy of their illustrious master. We are thus enabled to discuss with precision, and to explain with clearness, the principles of the science of human nature, which are in themselves on a level with the capacity of every man of good sense, and which only appeared to be abstruse from the unprofitable subtleties with which they were loaded, and the barbarous jargon in which they were expressed. The deepest doctrines of morality have since that time been treated in the perspicuous and popular style, and with some degree of the beauty and eloquence of the ancient moralists. That philosophy on which are founded the principles of our duty, if it has not become more certain (for morality admits no discoveries), is at least less "harsh and crabbed," less obscure and haughty in its language, less forbidding and disgusting in its appearance, than in the days of our ancestors. If this progress of learning towards popularity has engendered (as it must be owned that it has) a multitude of superficial and most mischievous sciolists, the antidote must come from the same quar-

ter with the disease. Popular reason can alone correct popular sophistry.

Nor is this the only advantage which a writer of the present age would possess over the celebrated jurists of the last century. Since that time vast additions have been made to the stock of our knowledge of human nature. Many dark periods of history have since been explored. Many hitherto unknown regions of the globe have been visited and described by travellers and navigators not less intelligent than intrepid. We may be said to stand at the confluence of the greatest number of streams of knowledge flowing from the most distant sources that ever met at one point. We are not confined, as the learned of the last age generally were, to the history of those renowned nations who are our masters in literature. We can bring before us man in a lower and more abject condition than any in which he was ever before seen. The records have been partly opened to us of those mighty empires of Asia* where the beginnings of civilization are lost in the darkness of an unfathom-

* I cannot prevail on myself to pass over this subject without paying my humble tribute to the memory of Sir W. Jones, who has laboured so successfully in Oriental literature, whose fine genius, pure taste, unwearied industry, unrivalled and almost prodigious variety of acquirements, not to speak of his amiable manners and spotless integrity, must fill every one who cultivates or admires letters with reverence, tinged with a melancholy which the recollection of his recent death is so well adapted to inspire. I hope I shall be pardoned if I add my applause to the genius and learning of Mr Maurice, who treads in the steps of his illustrious friend, and who has bewailed his death in a strain of genuine and beautiful poetry, not unworthy of happier periods of our English literature.

able antiquity. We can make human society pass in review before our mind, from the brutal and helpless barbarism of *Terra del Fuego*, and the mild and voluptuous savages of Otaheite, to the tame, but ancient and immovable civilization of China, which bestows its own arts on every successive race of conquerors; to the meek and servile natives of Hindostan, who preserve their ingenuity, their skill, and their science, through a long series of ages, under the yoke of foreign tyrants; to the gross and incorrigible rudeness of the Ottomans, incapable of improvement, and extinguishing the remains of civilization among their unhappy subjects once the most ingenious nations of the earth. We can examine almost every imaginable variety in the character, manners, opinions, feelings, prejudices, and institutions of mankind, into which they can be thrown, either by the rudeness of barbarism, or by the capricious corruptions of refinement, or by those innumerable combinations of circumstances, which, both in these opposite conditions and in all the intermediate stages between them, influence or direct the course of human affairs. History, if I may be allowed the expression, is now a vast museum, in which specimens of every variety of human nature may be studied. From these great accessions to knowledge, lawgivers and statesmen, but, above all, moralists and political philosophers, may reap the most important instruction. They may plainly discover in all the useful and beautiful variety of governments and institutions, and under all the fantastic multitude of usages and rites which have prevailed among men, the same funda-

mental, comprehensive truths, the sacred master-principles which are the guardians of human society, recognised and revered (with few and slight exceptions) by every nation upon earth, and uniformly taught (with still fewer exceptions) by a succession of wise men from the first dawn of speculation to the present moment. The exceptions, few as they are, will, on more reflection, be found rather apparent than real. If we could raise ourselves to that height from which we ought to survey so vast a subject, these exceptions would altogether vanish; the brutality of a handful of savages would disappear in the immense prospect of human nature, and the murmurs of a few licentious sophists would not ascend to break the general harmony. This consent of mankind in first principles, and this endless variety in their application, which is one among many valuable truths which we may collect from our present extensive acquaintance with the history of man, is itself of vast importance. Much of the majesty and authority of virtue is derived from their consent, and almost the whole of practical wisdom is founded on their variety.

What former age could have supplied facts for such a work as that of Montesquieu? He indeed has been, perhaps justly, charged with abusing this advantage, by the undistinguishing adoption of the narratives of travellers of very different degrees of accuracy and veracity. But if we reluctantly confess the justness of this objection; if we are compelled to own that he exaggerates the influence of climate, that he ascribes too much to the foresight and forming skill of legisla-

tors, and far too little to time and circumstances, in the growth of political constitutions; that the substantial character and essential differences of governments are often lost and confounded in his technical language and arrangement; that he often bends the free and irregular outline of nature to the imposing but fallacious geometrical regularity of system; that he has chosen a style of affected abruptness, sententiousness, and vivacity, ill suited to the gravity of his subject: after all these concessions (for his fame is large enough to spare many concessions), the Spirit of Laws will still remain not only one of the most solid and durable monuments of the powers of the human mind, but a striking evidence of the inestimable advantages which political philosophy may receive from a wide survey of all the various conditions of human society.

In the present century a slow and silent, but very substantial, mitigation has taken place in the practice of war; and in proportion as that mitigated practice has received the sanction of time, it is raised from the rank of mere usage, and becomes part of the law of nations. Whoever will compare our present modes of warfare with the system of Grotius* will clearly discern the immense improvements which have taken place in that respect since the publication of his work, during a period, perhaps in every point of view, the happiest to be found in the history of the world. In the same period many important points of public law

* Especially those chapters of the third book, entitled, *Temperamentum circa Captivos*, &c. &c.

have been the subject of contest both by argument and by arms, of which we find either no mention, or very obscure traces, in the history of preceding times.

There are other circumstances to which I allude with hesitation and reluctance, though it must be owned that they afford to a writer of this age some degree of unfortunate and deplorable advantage over his predecessors. Recent events have accumulated more terrible practical instruction on every subject of politics than could have been in other times acquired by the experience of ages. Men's wit sharpened by their passions, has penetrated to the bottom of almost all political questions. Even the fundamental rules of morality themselves have, for the first time, unfortunately for mankind, become the subject of doubt and discussion. I shall consider it as my duty to abstain from all mention of these awful events, and of these fatal controversies. But the mind of that man must indeed be incurious and indocile, who has either overlooked all these things, or reaped no instruction from the contemplation of them.

From these reflections it appears, that, since the composition of those two great works on the Law of Nature and Nations which continue to be the classical and standard works on that subject, we have gained both more convenient instruments of reasoning and more extensive materials for science; that the code of war has been enlarged and improved; that new questions have been practically decided; and that new controversies have arisen regarding the intercourse of

independent states, and the first principles of morality and civil government.

Some readers may, however, think that in these observations which I offer, to excuse the presumption of my own attempt, I have omitted the mention of later writers, to whom some part of the remarks is not justly applicable. But, perhaps, further consideration will acquit me in the judgment of such readers. Writers on particular questions of public law are not within the scope of my observations. They have furnished the most valuable materials; but I speak only of a system. To the large work of Wolffius, the observations which I have made on Puffendorff as a book for general use, will surely apply with tenfold force. His abridger, Vattel, deserves, indeed, considerable praise. He is a very ingenious, clear, elegant, and useful writer. But he only considers one part of this extensive subject, namely the law of nations strictly so called; and I cannot help thinking, that, even in this department of the science, he has adopted some doubtful and dangerous principles, not to mention his constant deficiency in that fulness of example and illustration, which so much embellishes and strengthens reason. It is hardly necessary to take any notice of the text-book of Heineccius, the best writer of elementary books with whom I am acquainted on any subject. Burlamaqui is an author of superior merit; but he confines himself too much to the general principles of morality and politics, to require much observation from me in this place. The same reason will excuse me for passing over in silence the works of

many philosophers and moralists, to whom, in the course of my proposed lectures, I shall owe and confess the greatest obligations; and it might perhaps deliver me from the necessity of speaking of the work of Dr Paley, if I were not desirous of this public opportunity of professing my gratitude for the instruction and pleasure which I have received from that excellent writer, who possesses, in so eminent a degree, those invaluable qualities of a moralist, good sense, caution, sobriety, and perpetual reference to convenience and practice; and who certainly is thought less original than he really is, merely because his taste and modesty have led him to disdain the ostentation of novelty, and because he generally employs more art to blend his own arguments with the body of received opinions, so as that they are scarce to be distinguished, than other men, in the pursuit of a transient popularity, have exerted to disguise the most miserable common-places in the shape of paradox.

No writer since the time of Grotius, of Puffendorff, and of Wolf, has combined an investigation of the principles of natural and public law, with a full application of these principles to particular cases; and in these circumstances, I trust, it will not be deemed extravagant presumption in me to hope that I shall be able to exhibit a view of this science, which shall, at least, be more intelligible and attractive to students, than the learned treatises of these celebrated men. I shall now proceed to state the general plan and subjects of the lectures in which I am to make this attempt.

I. The being whose actions the law of nature professes to regulate, is man. It is on the knowledge of his nature that the science of his duty must be founded.* It is impossible to approach the threshold of moral philosophy without a previous examination of the faculties and habits of the human mind. Let no reader be repelled from this examination by the odious and terrible name of *metaphysics*; for it is, in truth, nothing more than the employment of good sense, in observing our own thoughts, feelings, and actions; and when the facts which are thus observed are expressed as they ought to be, in plain language, it is, perhaps, above all other sciences, most on a level with the capacity and information of the generality of thinking men. When it is thus expressed, it requires no previous qualification, but a sound judgment, perfectly to comprehend it; and those who wrap it up in a technical and mysterious jargon, always give us strong reason to suspect that they are not philosophers but impostors. Whoever thoroughly understands such a science, must be able to teach it plainly to all men of common sense. The proposed course will therefore open with a very short, and, I hope, a very simple and intelligible account of the powers and operations of the human mind. By this plain statement of facts, it will not be difficult to decide many celebrated, though frivolous, and merely verbal controversies, which have long amused the leisure of the schools, and which owe both their fame

* Natura enim juris explicanda est nobis, *eaque ab hominis repetenda naturâ.*—*Cic. de Leg.* lib. i. c. 5.

and their existence to the ambiguous obscurity of scholastic language. It will, for example, only require an appeal to every man's experience, to prove that we often act purely from a regard to the happiness of others, and are therefore social beings; and it is not necessary to be a consummate judge of the deceptions of language, to despise the sophistical trifler, who tells us, that, because we experience a gratification in our benevolent actions, we are therefore exclusively and uniformly selfish. A correct examination of facts will lead us to discover that quality which is common to all virtuous actions, and which distinguishes them from those which are vicious and criminal. But we shall see that it is necessary for man to be governed not by his own transient and hasty opinion upon the tendency of every particular action, but by those fixed and unalterable rules, which are the joint result of the impartial judgment, the natural feelings, and the embodied experience of mankind. The authority of these rules is, indeed, founded only on their tendency to promote private and public welfare; but the morality of actions will appear solely to consist in their correspondence with the rule. By the help of this obvious distinction we shall vindicate a just theory, which, far from being modern, is, in fact, as ancient as philosophy, both from plausible objections, and from the odious imputation of supporting those absurd and monstrous systems which have been built upon it. Beneficial tendency is the foundation of rules, and the criterion by which habits and sentiments are to be tried. But it

is neither the immediate standard, nor can it ever be the principal motive, of action. An action, to be completely virtuous, must accord with moral rules, and must flow from our natural feelings and affections, moderated, matured, and improved into steady habits of right conduct.* Without, however, dwelling longer on subjects which cannot be clearly stated, unless they are fully unfolded, I content myself with observing, that it shall be my object, in this preliminary, but most important, part of the course, to lay the foundations of morality so deeply in human nature, as may satisfy the coldest inquirer; and, at the same time, to vindicate the paramount authority of the rules of our duty, at all times, and in all places, over all opinions of interest and speculations of benefit, so extensively, so universally, and so inviolably, as may well justify the grandest and the most apparently extravagant effusions of moral enthusiasm. If, notwithstanding all my endeavours to deliver these doctrines with the utmost simplicity, any of my auditors should still reproach me for introducing such abstruse matters, I must shelter myself behind the authority of the wisest of men. "If they (the ancient moralists), before they had come to the popular and received notions of virtue and vice, had staid a little longer upon the inquiry concerning *the roots of good and evil*, they had given, in my opinion, a great light to that which followed; and especially if they had consulted with nature, they had made their doc-

* Est autem virtus nihil aliud, quam in se perfecta atque ad summum perducta natura.—*Cic. de Leg.* lib. i. c. 8.

trines less prolix, and more profound."—*Bacon. Dign. and Adv. of Learn.* book ii. What Lord Bacon desired for the mere gratification of scientific curiosity, the welfare of mankind now imperiously demands. Shallow systems of metaphysics have given birth to a brood of abominable and pestilential paradoxes, which nothing but a more profound philosophy can destroy. However we may, perhaps, lament the necessity of discussions which may shake the habitual reverence of some men for those rules which it is the chief interest of all men to practise, we have now no choice left. We must either dispute, or abandon the ground. Undistinguishing and unmerited invectives against philosophy will only harden sophists and their disciples in the insolent conceit, that they are in possession of an undisputed superiority of reason; and that their antagonists have no arms to employ against them, but those of popular declamation. Let us not for a moment even appear to suppose, that philosophical truth and human happiness are so irreconcilably at variance. I cannot express my opinion on this subject so well as in the words of a most valuable, though generally neglected writer: "The science of abstruse learning, when completely attained, is like Achilles's spear, that healed the wounds it had made before; so this knowledge serves to repair the damage itself had occasioned, and this perhaps is all it is good for; it casts no additional light upon the paths of life, but disperses the clouds with which it had overspread them before; it advances not the traveller one step in his journey, but conducts him back

again to the spot from whence he wandered. Thus the land of Philosophy consists partly of an open champaign country, passable by every common understanding, and partly of a range of woods, traversable only by the speculative, and where they too frequently delight to amuse themselves. Since then we shall be obliged to make incursions into this latter track, and shall probably find it a region of obscurity, danger, and difficulty, it behoves us to use our utmost endeavours for enlightening and smoothing the way before us."* We shall, however, remain in the forest only long enough to visit the fountains of those streams which flow from it, and which water and fertilise the cultivated region of Morals, to become acquainted with the modes of warfare practised by its savage inhabitants, and to learn the means of guarding our fair and fruitful land against their desolating incursions. I shall hasten from speculations, to which I am naturally, perhaps, but too prone, and proceed to the more profitable consideration of our practical duty.

II. The first and most simple part of ethics is that which regards the duties of private men towards each other, when they are considered apart from the sanction of positive laws. I say *apart* from that sanction, not *antecedent* to it; for though we *separate* private from political duties for the sake of greater clearness and order in reasoning, yet we are not to be so deluded by this mere arrangement of conveni-

* Search's Light of Nature, by Abraham Tucker, Esq., vol. i. pref. p. xxxiii.

ence as to suppose that human society ever has subsisted, or ever could subsist, without being protected by government and bound together by laws. All these relative duties of private life have been so copiously and beautifully treated by the moralists of antiquity, that few men will now choose to follow them who are not actuated by the wild ambition of equalling Aristotle in precision, or rivalling Cicero in eloquence. They have been also admirably treated by modern moralists, among whom it would be gross injustice not to number many of the preachers of the Christian religion, whose peculiar character is that spirit of universal charity, which is the living principle of all our social duties. For it was long ago said, with great truth, by Lord Bacon, "that there never was any philosophy, religion, or other discipline, which did so plainly and highly exalt that good which is communicative, and depress the good which is private and particular, as the Christian faith."* The appropriate praise of this religion is not so much, that it has taught new duties, as that it breathes a milder and more benevolent spirit over the whole extent of morals.

On a subject which has been so exhausted, I should naturally have contented myself with the most slight and general survey, if some fundamental principles had not of late been brought into question, which, in all former times, have been deemed too evident to require the support of argument, and almost

* Bacon, Dign. and Adv. of Learn. book ii.

too sacred to admit the liberty of discussion. I shall here endeavour to strengthen some parts of the fortifications of morality which have hitherto been neglected, because no man had ever been hardy enough to attack them. Almost all the relative duties of human life will be found more immediately, or more remotely, to arise out of the two great institutions of property and marriage. They constitute, preserve, and improve society. Upon their gradual improvement depends the progressive civilization of mankind; on them rests the whole order of civil life. We are told by Horace, that the first efforts of lawgivers to civilise men consisted in strengthening and regulating these institutions, and fencing them round with rigorous penal laws.

> Oppida cœperunt munire et ponere leges
> Ne quis fur esset, neu latro, neu quis adulter.
>
> 1 *Serm.* iii. 105.

A celebrated ancient orator, of whose poems we have but a few fragments remaining, has well described the progressive order in which human society is gradually led to its highest improvements under the guardianship of those laws which secure property and regulate marriage.

> Et leges sanctas docuit, et chara jugavit
> Corpora conjugiis; et magnas condidit urbes.
>
> *Frag. C. Licin. Calvi.*

These two great institutions convert the selfish as well as the social passions of our nature into the firmest bands of a peaceable and orderly intercourse; they change the sources of discord into principles of

quiet; they discipline the most ungovernable, they refine the grossest, and they exalt the most sordid propensities; so that they become the perpetual fountain of all that strengthens, and preserves, and adorns society; they sustain the individual, and they perpetuate the race. Around these institutions all our social duties will be found at various distances to range themselves; some more near, obviously essential to the good order of human life, others more remote, and of which the necessity is not at first view so apparent; and some so distant, that their importance has been sometimes doubted, though upon more mature consideration they will be found to be outposts and advanced guards of these fundamental principles; that man should securely enjoy the fruits of his labour, and that the society of the sexes should be so wisely ordered as to make it a school of the kind affections, and a fit nursery for the commonwealth.

The subject of *property* is of great extent. It will be necessary to establish the foundation of the rights of acquisition, alienation, and transmission, not in imaginary contracts or a pretended state of nature, but in their subserviency to the subsistence and well-being of mankind. It will not only be curious, but useful, to trace the history of property from the first loose and transient occupancy of the savage, through all the modifications which it has at different times received, to that comprehensive, subtle, and anxiously minute code of property which is the last result of the most refined civilization.

I shall observe the same order in considering the

society of the sexes as it is regulated by the institution of marriage.* I shall endeavour to lay open those unalterable principles of general interest on which that institution rests: and if I entertain a hope that on this subject I may be able to add something to what our masters in morality have taught us, I trust, that the reader will bear in mind, as an excuse for my presumption, that *they* were not likely to employ much argument where they did not foresee the possibility of doubt. I shall also consider the history † of marriage, and trace it through all the forms which it has assumed, to that decent and happy permanency of union, which has, perhaps above all other causes, contributed to the quiet of society, and the refinement of manners in modern times. Among

* See on this subject an incomparable fragment of the first book of Cicero's Economics, which is too long for insertion here, but which, if it be closely examined, may perhaps dispel the illusion of those gentlemen, who have so strangely taken it for granted, that Cicero was incapable of exact reasoning.

† This progress is traced with great accuracy in some beautiful lines of Lucretius:—

——— Mulier conjuncta viro concessit in unum;
Castaque privatæ Veneris connubia læta
Cognita sunt, prolemque ex se vidêre creatam:
TUM GENUS HUMANUM PRIMUM MOLLESCERE CŒPIT.
——— puerique parentum
Blanditiis facile ingenium fregere superbum.
Tunc et amicitiam cœperunt jungere, habentes
Finitima inter se, nec lædere, nec violare;
Et pueros commendârunt, muliebreque sæclum;
Vocibus et gestu cum balbè significarent,
IMBECILLORUM ESSE ÆQUUM MISERIER OMNIUM.

Lucret. lib. v. l. 1010-22.

many other inquiries which this subject will suggest, I shall be led more particularly to examine the natural station and duties of the female sex, their condition among different nations, its improvement in Europe, and the bounds which Nature herself has prescribed to the progress of that improvement; beyond which, every pretended advance will be a real degradation.

III. Having established the principles of private duty, I shall proceed to consider man under the important relation of subject and sovereign, or, in other words, of citizen and magistrate. The duties which arise from this relation I shall endeavour to establish, not upon supposed compacts, which are altogether chimerical, which must be admitted to be false in fact, which, if they are to be considered as fictions, will be found to serve no purpose of just reasoning, and to be equally the foundation of a system of universal despotism in Hobbes, and of universal anarchy in Rousseau; but on the solid basis of general convenience. Men cannot subsist without society and mutual aid; they can neither maintain social intercourse nor receive aid from each other without the protection of government; and they cannot enjoy that protection without submitting to the restraints which a just government imposes. This plain argument establishes the duty of obedience on the part of the citizens, and the duty of protection on that of magistrates, on the same foundation with that of every other moral duty; and it shews, with sufficient evidence, that these du-

ties are reciprocal; the only rational end for which the fiction of a contract should have been invented. I shall not encumber my reasoning by any speculations on the origin of government; a question on which so much reason has been wasted in modern times; but which the ancients* in a higher spirit of philosophy have never once mooted. If our principles be just, our origin of government must have been coeval with that of mankind; and as no tribe has ever been discovered so brutish as to be without some government, and yet so enlightened as to establish a government by common consent, it is surely unnecessary to employ any serious argument in the confutation of the doctrine that is inconsistent with reason, and unsupported by experience. But though all inquiries into the origin of government be chimerical, yet the history of its progress is curious and useful. The various stages through which it passed from savage independence, which implies every man's power of injuring his neighbour, to legal liberty, which consists in every man's security against wrong; the manner in which a family expands into a tribe, and tribes

* The introduction to the first book of Aristotle's Politics is the best demonstration of the necessity of political society to the well-being, and indeed to the very being, of man, with which I am acquainted. Having shewn the circumstances which render man necessarily a social being, he justly concludes, "Καὶ ὅτι ἄνθρωπος φύσει πολιτικὸν ζῶον."—*Arist. de Rep.* lib. i.

The same scheme of philosophy is admirably pursued in the short, but invaluable fragment of the sixth book of Polybius, which describes the history and revolutions of government.

coalesce into a nation; in which public justice is gradually engrafted on private revenge, and temporary submission ripened into habitual obedience; form a most important and extensive subject of inquiry, which comprehends all the improvements of mankind in police, in judicature, and in legislation.

I have already given the reader to understand that the description of liberty which seems to me the most comprehensive, is that of *security against wrong*. Liberty is therefore the object of all government. Men are more free under every government, even the most imperfect, than they would be if it were possible for them to exist without any government at all: they are more secure from wrong, *more undisturbed in the exercise of their natural powers, and therefore more free, even in the most obvious and grossest sense of the word*, than if they were altogether unprotected against injury from each other. But as general security is enjoyed in very different degrees under different governments, those which guard it most perfectly, are by the way of eminence called *free*. Such governments attain most completely the end which is common to all government. A free constitution of government and a good constitution of government are therefore different expressions for the same idea.

Another material distinction, however, soon presents itself. In most civilised states the subject is tolerably protected against gross injustice from his fellows by impartial laws, which it is the manifest in-

terest of the sovereign to enforce. But some commonwealths are so happy as to be founded on a principle of much more refined and provident wisdom. The subjects of such commonwealths are guarded not only against the injustice of each other, but (as far as human prudence can contrive) against oppression from the magistrate. Such states, like all other extraordinary examples of public or private excellence and happiness, are thinly scattered over the different ages and countries of the world. In them the will of the sovereign is limited with so exact a measure, that his protecting authority is not weakened. Such a combination of skill and fortune is not often to be expected, and indeed never can arise, but from the constant though gradual exertions of wisdom and virtue, to improve a long succession of most favourable circumstances.

There is indeed scarce any society so wretched as to be destitute of some sort of weak provision against the injustice of their governors. Religious institutions, favourite prejudices, national manners, have in different countries, with unequal degrees of force, checked or mitigated the exercise of supreme power. The privileges of a powerful nobility, of opulent mercantile communities, of great judicial corporations, have in some monarchies approached more near to a control on the sovereign. Means have been devised with more or less wisdom to temper the despotism of an aristocracy over their subjects, and in democracies protect the minority against the majority, and the whole people against the

tyranny of demagogues. But in these unmixed forms of government, as the right of legislation is vested in one individual or in one order, it is obvious that the legislative power may shake off all the restraints which the laws have imposed on it. All such governments, therefore, tend towards despotism, and the securities which they admit against mis-government are extremely feeble and precarious. The best security which human wisdom can devise, seems to be the distribution of political authority among different individuals and bodies, with separate interests, and separate characters, corresponding to the variety of classes of which civil society is composed, each interested to guard their own order from oppression by the rest; each also interested to prevent any of the others from seizing on exclusive, and therefore despotic power; and all having a common interest to co-operate in carrying on the ordinary and necessary administration of government. If there were not an interest to resist each other in extraordinary cases, there would not be liberty. If there were not an interest to co-operate in the ordinary course of affairs, there could be no government. The object of such wise institutions which make selfishness of governors a security against their injustice, is to protect men against wrong both from their rulers and their fellows. Such governments are, with justice, peculiarly and emphatically called *free*; and in ascribing that liberty to the skilful combination of mutual dependence and mutual check, I feel my own conviction greatly strengthened by calling to mind, that in this opinion I agree with all the wise men who

have ever deeply considered the principles of politics; with Aristotle and Polybius, with Cicero and Tacitus, with Bacon and Machiavel, with Montesquieu and Hume.* It is impossible in such a cursory sketch as the present, even to allude to a very small part of those philosophical principles, political reasonings, and historical facts, which are necessary for the illustration of this momentous subject. In a full discussion of it I shall be obliged to examine the general frame of the most celebrated governments of ancient and modern times, and especially of those which have been most renowned for their freedom. The result of such an examination will be, that no institution so detestable as an absolutely unbalanced government, perhaps ever existed; that the simple

* To the weight of these great names let me add the opinion of two illustrious men of the present age, as both their opinions are combined by one of them in the following passages: "He (Mr Fox) always thought any of the simple unbalanced governments bad; simple monarchy, simple aristocracy, simple democracy; he held them all imperfect or vicious, all were bad by themselves; the composition alone was good. These had been always his principles, in which he agreed with his friend, Mr Burke."—*Mr Fox on the Army Estimates*, 9th Feb. 1790.

In speaking of both these illustrious men, whose names I here join, as they will be joined in fame by posterity, which will forget their temporary differences in the recollection of their genius and their friendship, I do not entertain the vain imagination that I can add to their glory by any thing that I can say. But it is a gratification to me to give utterance to my feelings; to express the profound veneration with which I am filled for the memory of the one, and the warm affection which I cherish for the other, who no one ever heard in public without admiration, or knew in private life without loving.

governments are mere creatures of the imagination of theorists, who have transformed names used for convenience of arrangement into real politics; that, as constitutions of government approach more nearly to that unmixed and uncontrolled simplicity they become despotic, and as they recede farther from that simplicity they become free.

By the constitution of a state, I mean "*the body of those written and unwritten fundamental laws which regulate the most important rights of the higher magistrates, and the most essential privileges* of the subjects.*" Such a body of political laws must in all countries arise out of the character and situation of a people; they must grow with its progress, be adapted to its peculiarities, change with its changes, and be incorporated with its habits. Human wisdom cannot form such a constitution by one act, for human wisdom cannot create the materials of which it is composed. The attempt, always ineffectual, to change by violence the ancient habits of men, and the established order of society, so as to fit them for an absolutely new scheme of government, flows from the most presumptuous ignorance, requires the support of the most ferocious tyranny, and leads to consequences which its authors can never foresee; genc-

* *Privilege*, in Roman jurisprudence, means the *exemption* of one individual from the operation of a law. Political privileges, in the sense in which I employ the terms, mean those rights of the subjects of a free state, which are deemed so essential to the well-being of the commonwealth, that they are *excepted* from the ordinary discretion of the magistrate, and guarded by the same fundamental laws which secure his authority.

rally, indeed, to institutions the most opposite to those of which they profess to seek the establishment.* But human wisdom indefatigably employed for remedying abuses, and in seizing favourable opportunities of improving that order of society which arises from causes over which we have little control, after the reforms and amendments of a series of ages, has sometimes though very rarely,† shewn itself capable of building up a free constitution, which is "the growth of time and nature, rather than the work of human invention." Such a constitution can only be formed by the wise imitation of "*the great innovator* TIME, which, indeed, innovateth greately, but quietly, and by degrees scarce to be perceived."‡ Without descending to the puerile ostentation of panegyric, on that of which all mankind confess the excellence, I may observe, with truth and soberness, that a free

* See an admirable passage on this subject in Dr Smith's Theory of Moral Sentiments, vol. ii. pp. 101–112, in which the true doctrine of reformation is laid down with singular ability by that eloquent and philosophical writer.—See also Mr Burke's Speech on Economical Reform; and Sir M. Hale on the Amendment of Laws, in the collection of my learned and most excellent friend, Mr Hargrave, p. 248.

† Pour former un gouvernement modéré, il faut combiner les puissances, les régler, les tempérer, les faire agir, donner pour ainsi dire un lest à l'une pour la mettre en état de résister à une autre, c'est un chef-d'œuvre de légialation que le hasard fait rarement, et que rarement on laisse faire à la prudence. Un gouvernement despotique au contraire saute pour ainsi dire aux yeux; il est uniforme partout: comme il ne faut que des passions pour l'établir tout le monde est bon pour cela.—*Montesquieu, de l'Esprit de Loix*, liv. v. c. 14.

‡ Lord Bacon, Essay xxiv. Of Innovations.

government not only establishes an universal security against wrong, but that it also cherishes all the noblest powers of the human mind; that it tends to banish both the mean and the ferocious vices; that it improves the national character to which it is adapted, and out of which it grows; that its whole administration is a practical school of honesty and humanity; and that there the social affections, expanded into public spirit, gain a wider sphere, and a more active spring.

I shall conclude what I have to offer on government, by an account of the constitution of England. I shall endeavour to trace the progress of that constitution by the light of history, of laws, and of records, from the earliest times to the present age; and to shew how the general principles of liberty, originally common to it with the other Gothic monarchies of Europe, but in other countries lost or obscured, were in this more fortunate island preserved, matured, and adapted to the progress of civilization. I shall attempt to exhibit this most complicated machine, as our history and our laws shew it in action; and not as some celebrated writers have most imperfectly represented it, who have torn out a few of its more simple springs, and, putting them together, miscall them the British constitution. So prevalent indeed, have these imperfect representations hitherto been, that I will venture to affirm, there is scarcely any subject which has been less treated as it deserved than the government of England. Philosophers of great and

merited reputation* have told us that it consisted of certain portions of monarchy, aristocracy, and democracy; names which are, in truth, very little applicable, and which, if they were, would as little give an idea of this government, as an account of the weight of bone, of flesh, and of blood in a human body, would be a picture of a living man. Nothing but a patient and minute investigation of the practice of the government in all its parts, and through its whole history, can give us just notions on this important subject. If a lawyer, without a philosophical spirit, be unequal to the examination of this great work of liberty and wisdom, still more unequal is a philosopher without practical, legal, and historical knowledge; for the first may want skill, but the second wants materials. The observations of Lord Bacon on political writers, in general, are most applicable to those who have given us systematic descriptions of the English constitution. "All those who have written of governments have written as philosophers, or as lawyers, *and none as statesmen.* As for the philosophers, they make imaginary laws for imaginary commonwealths, and their discourses are as the stars, which give little light because they are so high."—"*Hæc cognitio ad viros civiles propriè pertinet,*" as he tells us in another part of his writings; but unfortunately no experienced philosophical British statesman has yet devoted his

* The reader will perceive that I allude to MONTESQUIEU, whom I never name without reverence, though I shall presume, with humility, to criticise his account of a government which he only saw at a distance.

leisure to a delineation of the constitution, which such a statesman alone can practically and perfectly know.

In the discussion of this great subject, and in all reasonings on the principles of politics, I shall labour, above all things, to avoid that which appears to me to have been the constant source of political error: I mean the attempt to give an air of system, of simplicity, and of rigorous demonstration, to subjects which do not admit it. The only means by which this could be done, was by referring to a few simple causes, what, in truth, arose from immense and intricate combinations, and successions of causes. The consequence was very obvious. The system of the theorist, disencumbered from all regard to the real nature of things, easily assumed an air of speciousness. It required little dexterity to make his argument appear conclusive. But all men agreed that it was utterly inapplicable to human affairs. The theorist railed at the folly of the world, instead of confessing his own; and the men of practice unjustly blamed philosophy, instead of condemning the sophist. The causes which the politician has to consider are, above all others, multiplied, mutable, minute, subtile, and, if I may so speak, evanescent; perpetually changing their form, and varying their combinations; losing their nature, while they keep their name; exhibiting the most different consequences in the endless variety of men and nations on whom they operate; in one degree of strength producing the most signal benefit; and, under a slight variation of circumstances, the most tremendous mischiefs. They admit indeed of being re-

duced to theory; but to a theory formed on the most extensive views, of the most comprehensive and flexible principles, to embrace all their varieties, and to fit all their rapid transmigrations; a theory, of which the most fundamental maxim is, distrust in itself, and deference for practical prudence. Only two writers of former times have, as far as I know, observed this general defect of political reasoners; but these two are the greatest philosophers who have ever appeared in the world. The first of them is Aristotle, who, in a passage of his Politics, to which I cannot at this moment turn, plainly condemns the pursuit of a delusive geometrical accuracy in moral reasonings as the constant source of the grossest error. The second is Lord Bacon, who tells us, with that authority of conscious wisdom which belongs to him, and with that power of richly adorning truth from the wardrobe of genius which he possessed above *almost* all men, "Civil knowledge is conversant about a subject which, above all others, is most immersed in matter, and hardliest reduced to axiom."*

IV. I shall next endeavour to lay open the general

* This principle is expressed by a writer of a very different character from these two great philosophers; a writer, "*qu'on n'appellera plus philosophe, mais qu'on appellera le plus éloquent des sophistes*," with great force, and, as his manner is, with some exaggeration.

Il n'y a point de principes abstraits dans la politique. C'est une science des calculs, des combinaisons, et des exceptions, selon les lieux, les tems, et les circonstances.—*Lettre de Rousseau au Marquis de Mirabeau.*

The second proposition is true; but the first is not a just inference from it.

principles of civil and criminal laws. On this subject I may with some confidence hope that I shall be enabled to philosophize with better materials by my acquaintance with the laws of my own country, which it is the business of my life to practise, and of which the study has by habit become my favourite pursuit.

The first principles of jurisprudence are simple maxims of reason, of which the observance is immediately discovered by experience to be essential to the security of men's rights, and which pervade the laws of all countries. An account of the gradual application of these original principles, first to more simple, and afterwards to more complicated cases, forms both the history and the theory of law. Such an historical account of the progress of men, in reducing justice to an applicable and practical system, will enable us to trace that chain, in which so many breaks and interruptions are perceived by superficial observers, but which in truth inseparably, though with many dark and hidden windings, links together the security of life and property with the most minute and apparently frivolous formalities of legal proceeding. We shall perceive that no human foresight is sufficient to establish such a system at once, and that, if it were so established, the occurrence of unforeseen cases would shortly altogether change it; that there is but one way of forming a civil code, either consistent with common sense, or that has ever been practised in any country, namely, that of gradually building up the law in proportion as the facts arise which it is to regulate. We shall learn to appreciate the

merit of vulgar objections against the subtlety and complexity of laws. We shall estimate the good sense and the gratitude of those who reproach lawyers for employing all the powers of their mind to discover subtle distinctions for the prevention of injustice:* and we shall at once perceive that laws ought to be neither more *simple* nor more *complex* than the state of society which they are to govern, but that they ought exactly to correspond to it. Of the two faults, however, the excess of simplicity would certainly be the greatest; for laws, more complex than are necessary, would only produce embarrassment; whereas laws more simple than the affairs which they regulate would occasion a defect of justice. More understanding † has perhaps been in this manner exerted to fix the rules of life than in any other science; and it is certainly the most honourable occupation of the understanding, because it is the most immediately subservient to general safety and comfort. There is not, in my opinion, in the whole compass of human affairs, so noble a spectacle as that which is displayed in the progress of jurisprudence; where we may contemplate the cautious and unwearied exertions of a suc-

* The casuistical subtleties are not perhaps greater than the subtleties of lawyers; *but the latter are innocent, and even necessary.* —HUME's *Essays*, vol. ii. p. 558.

† "Law," said Dr Johnson, "is the science in which the greatest powers of understanding are applied to the greatest number of facts." Nobody, who is acquainted with the variety and multiplicity of the subjects of jurisprudence, and with the prodigious powers of discrimination employed upon them, can doubt the truth of this observation.

cession of wise men through a long course of ages; withdrawing every case as it arises from the dangerous power of discretion, and subjecting it to inflexible rules; extending the dominion of justice and reason, and gradually contracting, within the narrowest possible limits, the domain of brutal force and of arbitrary will. This subject has been treated with such dignity by a writer who is admired by all mankind for his eloquence, but who is, if possible, still more admired by all competent judges for his philosophy; a writer, of whom I may justly say, that he was "*gravissimus et dicendi et intelligendi auctor et magister;*" that I cannot refuse myself the gratification of quoting his words:—"The science of jurisprudence, the pride of the human intellect, which, with all its defects, redundancies, and errors, is the collected reason of ages combining the principles of original justice with the infinite variety of human concerns."*

I shall exemplify the progress of law, and illustrate those principles of universal justice on which it is founded, by a comparative review of the two greatest civil codes that have been hitherto formed—those of Rome and of England;† of their agreements and dis-

* Burke's Works, vol. iii. p. 134.

† On the intimate connexion of these two codes, let us hear the words of Lord Holt, whose name never can be pronounced without veneration, as long as wisdom and integrity are revered among men:—"Inasmuch *as the laws of all nations are doubtless raised out of the ruins of the civil law*, as all governments are sprung out of the ruins of the Roman empire, it must be owned *that the principles of our law are borrowed from the civil law*, therefore grounded upon the same reason in many things."—12 *Mod. Rep.* 482.

agreements, both in general provisions, and in some of the most important parts of their minute practice. In this part of the course, which I mean to pursue with such detail as to give a view of both codes, that may perhaps be sufficient for the purposes of the general student, I hope to convince him that the laws of civilized nations, particularly those of his own, are a subject most worthy of scientific curiosity; that principle and system run through them even to the minutest particular, as really, though not so apparently, as in other sciences, and applied to purposes more important than in any other science. Will it be presumptuous to express a hope, that such an inquiry may not be altogether an useless introduction to that larger and more detailed study of the law of England, which is the duty of those who are to profess and practise that law?

In considering the important subject of criminal law it will be my duty to found, on a regard to the general safety, the right of the magistrate to inflict punishments, even the most severe, if that safety cannot be effectually protected by the example of inferior punishments. It will be a more agreeable part of my office to explain the temperaments which Wisdom, as well as Humanity, prescribes in the exercise of that harsh right, unfortunately so essential to the preservation of human society. I shall collate the penal codes of different nations, and gather together the most accurate statement of the result of experience with respect to the efficacy of lenient and severe punishments; and I shall endeavour to ascertain the

principles on which must be founded both the proportion and the appropriation of penalties to crimes.

As to the *law of criminal proceeding*, my labour will be very easy; for on that subject an English lawyer, if he were to delineate the model of perfection, would find that, with few exceptions, he had transcribed the institutions of his own country. The whole subject of my lectures, of which I have now given the outline, may be summed up in the words of Cicero:—"Natura enim juris explicanda est nobis, eaque ab hominis repetenda naturâ; considerandæ leges quibus civitates regi debeant; tum hæc tractanda quæ composita sunt et descripta, jura et jussa populorum; in quibus NE NOSTRI QUIDEM POPULI LATEBUNT QUÆ VOCANTUR JURA CIVILIA."—*Cic. de Leg.* lib. i. c. 5.

V. The next great division of the subject is the law of nations, strictly and properly so called. I have already hinted at the general principles on which this law is founded. They, like all the principles of natural jurisprudence, have been more happily cultivated, and more generally obeyed, in some ages and countries than in others; and, like them, are susceptible of great variety in their application, from the character and usages of nations. I shall consider these principles in the gradation of those which are necessary to any tolerable intercourse between nations; those which are essential to all well-regulated and mutually advantageous intercourse; and those which are highly conducive to the preservation of a mild and friendly intercourse between civilized states.

Of the first class, every understanding acknowledges the necessity, and some traces of a faint reverence for them are discovered even among the most barbarous tribes; of the second, every well-informed man perceives the important use, and they have generally been respected by all polished nations; of the third, the great benefit may be read in the history of modern Europe, where alone they have been carried to their full perfection. In unfolding the first and second class of principles, I shall naturally be led to give an account of that law of nations, which, in greater or less perfection, regulated the intercourse of savages, of the Asiatic empires, and of the ancient republics. The third brings me to the consideration of the law of nations, as it is now acknowledged in Christendom. From the great extent of the subject, and the particularity to which, for reasons already given, I must here descend, it is impossible for me, within my moderate compass, to give even an outline of this part of the course. It comprehends, as every reader will perceive, the principles of national independence, the intercourse of nations in peace, the privileges of embassadors and inferior ministers, the commerce of private subjects, the grounds of just war, the mutual duties of belligerent and neutral powers, the limits of lawful hostility, the rights of conquest, the faith to be observed in warfare, the force of an armistice, of safe conducts and passports, the nature and obligation of alliances, the means of negotiation, and the authority and interpretation of treaties of peace. All these, and many other most im-

portant and complicated subjects, with all the variety of moral reasoning, and historical examples, which is necessary to illustrate them, must be fully examined in this part of the lectures, in which I shall endeavour to put together a tolerably complete practical system of the law of nations, as it has for the last two centuries been recognised in Europe.

" *Le droit des gens* est naturellement fondé sur ce principe, que les diverses nations doivent se faire, dans la paix, le plus de bien, et dans la guerre le moins de mal, qu'il est possible, sans nuire à leurs véritables intérêts.

" L'objet de la guerre c'est la victoire ; celui de la victoire la conquête ; celui de la conquête la conservation. De ce principe et du précédent, doivent dériver toutes les loix qui forment *le droit des gens.*

" Toutes les nations ont un droit des gens ; les *Iroquois* même, qui mangent leurs prisonniers, en ont un. Ils envoient et reçoivent des embassades ; ils connoissent les droits de la guerre et de la paix : le mal est que ce droit des gens n'est pas fondé sur les vrais principes."—*De l'Esprit des Loix*, liv. i. c. 3.

VI. As an important supplement to the practical system of our modern law of nations, or rather as a necessary part of it, I shall conclude with a survey of the *diplomatic and conventional law of Europe ;* of the treaties which have materially affected the distribution of power and territory among the European states ; the circumstances which gave rise to them, the changes which they effected, and the principles which they introduced into the public code of the

Christian commonwealth. In ancient times the knowledge of this conventional law was thought one of the greatest praises that could be bestowed on a name loaded with all the honours that eminence in the arts of peace and war can confer:

"Equidem existimo, judices, cùm in omni genere ac varietate artium, etiam illarum, quæ sine summo otio non facilè discuntur, Cn. Pompeius excellat, singularem quandam laudem ejus et præstabilem esse scientiam, *in fœderibus, pactionibus, conditionibus, populorum, regum, exterarum nationum:* in universo denique belli jure ac pacis."—*Cic. Orat. pro L. Corn. Balbo*, c. 6.

Information on this subject is scattered over an immense variety of voluminous compilations; not accessible to every one, and of which the perusal can be agreeable only to very few. Yet so much of these treaties has been embodied into the general law of Europe, that no man can be master of it who is not acquainted with them. The knowledge of them is necessary to negotiators and statesmen; it may sometimes be important to private men in various situations in which they may be placed; it is useful to all men who wish either to be acquainted with modern history, or to form a sound judgment on political measures. I shall endeavour to give such an abstract of it as may be sufficient for some, and a convenient guide for others in the farther progress of their studies. The treaties which I shall more particularly consider, will be those of Westphalia, of Oliva, of the Pyrenees, of Breda, of Nimeguen, of Ryswick, of

Utrecht, of Aix-la-Chapelle, of Paris (1763), and of Versailles (1783). I shall shortly explain the other treaties, of which the stipulations are either alluded to, confirmed, or abrogated in those which I consider at length. I shall subjoin an account of the diplomatic intercourse of the European powers with the Ottoman Porte, and with other princes and states who are without the pale of our ordinary federal law; together with a view of the most important treaties of commerce, their principles, and their consequences.

As an useful appendix to a practical treatise on the law of nations, some account will be given of those tribunals which in different countries of Europe decide controversies arising out of that law; of their constitution, of the extent of their authority, and of their modes of proceeding; more especially of those courts which are peculiarly appointed for that purpose by the laws of Great Britain.

Though the course, of which I have sketched the outline, may seem to comprehend so great a variety of miscellaneous subjects, yet they are all in truth closely and inseparably interwoven. The duties of men, of subjects, of princes, of lawgivers, of magistrates, and of states, are all parts of one consistent system of universal morality. Between the most abstract and elementary maxim of moral philosophy, and the most complicated controversies of civil or public law, there subsists a connexion which it will be the main object of these lectures to trace. The principle of justice, deeply rooted in the nature and interest of man, pervades the whole system, and is discoverable in every

part of it, even to its minutest ramification in a legal formality, or in the construction of an article in a treaty.

I know not whether a philosopher ought to confess, that in his inquiries after truth he is biassed by any consideration; even by the love of virtue. But I, who conceive that a real philosopher ought to regard truth itself chiefly on account of its subserviency to the happiness of mankind, am not ashamed to confess, that I shall feel a great consolation at the conclusion of these lectures, if, by a wide survey and an exact examination of the conditions and relations of human nature, I shall have confirmed but one individual in the conviction, that justice is the permanent interest of all men, and of all commonwealths. To discover one new link of that eternal chain by which the Author of the universe has bound together the happiness and the duty of his creatures, and indissolubly fastened their interests to each other, would fill my heart with more pleasure than all the fame with which the most ingenious paradox ever crowned the most eloquent sophist.

I shall conclude this Discourse in the noble language of two great orators and philosophers, who have, in a few words, stated the substance, the object, and the result of all morality, and politics, and law.

"Nihil est quod adhuc de republicâ putem dictum, et quo possim longius progredi, nisi sit confirmatum, non modo falsum esse illud, sine injuriâ non posse, sed hoc verissimum, sine summâ justitiâ rempublicam geri nullo modo posse."—*Cic. Frag.* lib. ii. *de Repub*

" Justice is itself the great standing policy of civil society, and any eminent departure from it, under any circumstances, lies under the suspicion of being no policy at all."—*Burke's Works*, vol. iii. p. 207.

FINIS.

A DISCOURSE

ON THE

PAST HISTORY, PRESENT STATE,

AND

FUTURE PROSPECTS

OF

THE LAW.

BY THE

HON. JOSEPH STORY,

ONE OF THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES.

EDINBURGH:
THOMAS CLARK, 38 GEORGE STREET.
MDCCCXXXV.

A DISCOURSE

ON THE

PAST HISTORY, PRESENT STATE, AND FUTURE PROSPECTS OF THE LAW.

In comparing the present state of jurisprudence with that of former times, we have much reason for congratulation. In governments purely despotic the laws rarely undergo any considerable changes through a long series of ages. The fundamental institutions (for such there must be in all civilized societies), whether modelled at first by accident or by design, by caprice or by wisdom, assume a settled course, which is broken in upon only by positive edicts of the sovereign, suited to some temporary exigency. These edicts rarely touch any general regulation of the state, and still more rarely attempt any general melioration of the laws. For the most part they affect only to express the arbitrary will of the monarch, stimulated by some pressing private interest, or gratifying some temporary passion, or some fleeting state policy. There is in such governments what

have been stationary since the Christian era, those of Europe have undergone the most extraordinary revolutions; attaining at one period great refinement and equity, then sinking from that elevation into deep obscurity and barbarism under the northern invaders, and rising again from the ruins of ancient grandeur to assume a new perfection and beauty, which first softened the features, and then extinguished the spirit of the feudal system.

It is not, however, upon topics of this sort, suggested by a broad and general survey of the past, however interesting to the philosophical inquirer, that I propose to dwell at this time. My purpose rather is, to offer some considerations touching the past and present state of the common law, and to suggest some hints as to its future prospects in our own country, and the sources from which any probable improvements must be derived. In doing this, I shall attempt nothing more than a few plain sketches, contenting myself with the hope of being useful, and leaving to others of higher talents and attainments the more ambitious path of eloquence and learning.

The history of the common law may be divided into three great epochs; the first extending from the reign of William the Conqueror to the Reformation; the second from the reign of Elizabeth to the Revolution, which placed the House of Brunswick on the throne; and the third including the period which has since elapsed, down to our own time.

The first of these epochs embraces the origin and complete establishment of the feudal system, with all

its curious burthens and appendages; its primer seizins, its aids, its reliefs, its escheats, its wardships, its fines upon marriages and alienations, and its chivalrous and socage services. Connected with these were the distinct establishment of tribunals of justice, administered first by Judges in Eyre, and afterwards by Courts at Westminster; the introduction of assizes and writs of entry, and the perfecting of all those forms of remedies, by which rights are enforced and wrongs redressed. Some of the most venerable sages of the law belong to this period; the methodical and almost classical Bracton; the neat and perspicuous Glanville; the exact and unknown author of Fleta; the criminal treatise of Britton; the ponderous collections of Statham, Fitzherbert, and Brooke; and, above all, the venerable Year Books themselves, the grand depositories of the ancient common law, whence the Littletons and the Cokes, the Hobarts and the Hales of later times drew their precious and almost inexhaustible learning. Of these black-lettered volumes few in our days can boast the mastery. Even in England they are suffered to repose on dusty and neglected shelves, rarely disturbed, except when some nice question upon an appeal of death, upon the nature of seizin, or upon proceedings in writs of right, calls them up, like the spirits of a departed age, to bear their testimony in the strife. This, too, was the age of scholastic refinements, and metaphysical subtleties, and potent quibbles, and mysterious conceits; when special pleading pored over its midnight lamp, and conjured up its phantoms to perplex, to be-

wilder, and sometimes to betray. This, too, was the age of strained and quaint argumentation, when the discussions of the bar were perilously acute and cunning. And yet, though much of the law of these times is grown obsolete, and the task of attempting a general revival is hopeless, it cannot be denied that it abounds with treasures of knowledge. It affords the only sure foundations in many cases on which to build a solid fabric of argument; and no one ever explored its depths, rough and difficult as they are, without bringing back instruction fully proportioned to his labour.

The commencement of the second period is rendered remarkable by the enactment of two statutes, which have probably conduced more than any others to change the condition of real property, and, at the same time that they have facilitated its application to the business and the wants of real life, have in no small degree rendered its titles intricate. I allude to the great statutes of Wills and of Uses in the reign of Henry VIII. The former of them has crowded our books of reports with cases more numerous and more difficult in construction than any other single branch of the law. The latter, followed up by the statute of Elizabeth of Charitable Uses, laid the foundation of that broad and comprehensive judicature, in which equity administers through its searching interrogatories, addressed to the consciences of men the most beneficent and wholesome principles of justice. The whole modern structure of Trusts, infinitely diversified as it is, by marriage settlements,

terms to raise portions or to pay debts, contingent and springing appointments, resulting uses and implied trusts,—grew out of this statute, and the constructions put upon it. And it is scarcely figurative language to assert, that the scintilla juris of Chudleigh's case is the spark that kindled that flame, which has burned so brightly and benignantly in the courts of equity in modern times.

Two statutes equally remarkable adorned the close of this second period; the one the statute of Habeas Corpus, the great bulwark of personal liberty, the other the statute abolishing the burthensome tenures of the Feudal Law. These were the triumphs of sound reason and free inquiry over the dictates of oppression and ignorance. They were the harbinger of better days, and gave lustre to an age, which was scarcely redeemed from profligacy by the purity of Lord Hale, and was deeply disgraced by the harsh and vindictive judgments of Lord Jeffries. Yet, through the whole of this period, we may trace a steady improvement in the great departments of the law. Under the guidance of Lord Bacon the business of Chancery assumed a regular course, and at the distance of two centuries his celebrated Ordinances continue to be the pole-star which directs the practice of that court. A more noble homage to his memory, or a more striking proof of the profoundness of his genius, and of the wisdom and comprehensiveness of his views, can scarcely be imagined. And it may be truly affirmed, that his Novum Organum scarcely introduced a more salutary change in the

study of physics and experimental philosophy, than his Ordinances did in the practical administration of equity. The common law, too, partaking of the spirit and enterprise of the times, gradually shifted and widened its channels. Courts of justice were no longer engaged in settling ecclesiastical or feudal rights and services. The intricacies of real actions were laid aside for the more convenient and expeditious trial of titles by ejectment. Assizes and writs of entry fell into neglect, and the subtleties of logic were exchanged for the more useful inductions of common sense. Arguments were no longer buried under a mass of learning; and Reports, instead of overwhelming the profession, as in the pages of the venerable Plowden, with a flood of ancient authorities and curious analogies, began to be directed to the points in controversy with brevity and exactness. Philosophy, too, lent its aid to illustrate the science, and the criminal law, though occasionally disgraced by abuses, was softened by the humanity, illustrated by the genius, and methodised by the labours, of the greatest luminaries of the law.

The third period may not inaptly be termed the Golden Age of the Law; since it embraces the introduction of the principles of commercial law, and the application of them with wonderful success to the exposition of the then comparatively novel contracts of bills of exchange, promissory-notes, bills of lading, charter-parties, and, above all, policies of insurance. Lord Holt, with great sagacity and boldness, led the way to some of the most important improvements by

his celebrated judgment in Coggs *v.* Barnard, in which the law of bailments is expounded with philosophical precision and fulness. It is true, that the leading maxims are borrowed from the Roman Law; as the beautiful treatise of Sir William Jones sufficiently explains to the humblest student; but the merit of Lord Holt is scarcely lessened by this consideration, since he had the talent to discern their value, and the judgment to transfer them into the English code. The modest close of his opinion in this case shews how little the law on this subject was at that time settled, and how much we owe to the achievements of a single mind. "I have said thus much" (is his language) "on this case, because it is of great consequence that the law should be settled on this point. But I don't know whether I may have settled it, or may not rather have unsettled it. But however that may happen, I have stirred these points, which wiser heads in time may settle." Wiser heads have not settled these points. This branch of the law stands now at the distance of more than a century on the immoveable foundation where this great man placed it, the foundation of reason and justice. And if he had left no other judgment on record, this alone would justify the eulogy of an eminent modern judge, that "he was as great a lawyer as ever sat in Westminster Hall."

The doctrines of the Courts of Equity during this last period have attained a high degree of perfection, though the origin of them must in many cases be admitted to belong to the preceding age. Lord Not-

tingham brought to the subject a strong and cultivated mind, and pronounced his decrees after the most cautious and painstaking study. Lord Cowper and Lord Talbot pursued the same career with the genuine spirit of jurists. But it was reserved for Lord Hardwicke, by his deep learning, his extensive researches, and his powerful genius, to combine the scattered fragments into a scientific system; to define with a broader line the boundaries between the departments of the common law and chancery; and to give certainty and vigour to the principles as well as the jurisdiction of the latter. Henceforth equity began to acquire the same exactness as the common law; and at this moment there is scarcely a branch of its jurisprudence that is not reduced to method, and does not, in the harmony of its parts, rival the best examples of the common law. Our own age has witnessed, in the labours of Lord Eldon, through a series of more than twenty-five volumes of reports, a diligence, sagacity, caution, and force of judgment, which have seldom been equalled, and can scarcely be surpassed; which have given dignity, as well as finish, to that curious moral machinery, which, dealing in an artificial system, yet contrives to administer the most perfect of human inventions,—the doctrines of conscience ex æquo et bono.

There is another great name, which adorns this period, respecting whom it is difficult to speak in terms of moderated praise, and still more difficult to preserve silence. England and America, and the civilized world, lie under the deepest obligations to him.

Wherever commerce shall extend its social influences; wherever justice shall be administered by enlightened and liberal rules; wherever contracts shall be expounded upon the eternal principles of right and wrong; wherever moral delicacy and juridical refinement shall be infused into the municipal code, at once to persuade men to be honest, and to keep them so; wherever the intercourse of mankind shall aim at something more elevated than that grovelling spirit of barter, in which meanness, and avarice, and fraud strive for the mastery over ignorance, credulity, and folly,—the name of Lord Mansfield will be held in reverence by the good and the wise, by the honest merchant, the enlightened lawyer, the just statesman, and the conscientious judge. The maxims of maritime jurisprudence which he engrafted into the stock of the common law, are not the exclusive property of a single age or nation, but the common property of all times and all countries. They are built upon the most comprehensive principles, and the most enlightened experience of mankind. He designed them to be of universal application, considering, as he himself has declared, the maritime law to be, not the law of a particular country, but the general law of nations. And such under his administration it became, as his prophetic spirit, in citing a passage from the most eloquent and polished orator of antiquity, seems gently to insinuate. "Non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed, et apud omnes gentes et omni tempore, una eademque lex obtinebit." He was ambitious of this noble fame, and studied

deeply, and diligently, and honestly to acquire it. He surveyed the commercial law of the continent, drawing from thence what was most just, useful, and rational; and left to the world, as the fruit of his researches, a collection of general principles, unexampled in extent, and unequalled in excellence. The law of Insurance was almost created by him; and it would be difficult to find a single leading principle in the beautiful system that surrounds and protects the commerce of our times, which may not be traced back to the judgments of this surprising man. Of him it cannot be said, *Stat magni nominis umbra.* His character as a statesman and an orator, as the rival and the equal of Chatham and Camden, would immortalize him. But the proudest monument of his fame is in the volumes of Burrow, and Cowper, and Douglas, which we may fondly hope will endure as long as the language in which they are written shall continue to instruct mankind.

I have been drawn into these remarks on the character of Lord Mansfield, beyond the scope of my original intention, by my extreme solicitude to impress the younger members of the profession with a due sense of his learning and his labours. It appears to me, that his judgments should not be merely referred to, and read, on the spur of particular occasions, but should be studied as models of juridical reasoning and eloquence. I know not where a student can learn so much or so well, as in the reports which I have named; and there is scarcely a sentence which dropped from his lips which may not prove of perma-

nent utility to the profession. Our young men of the present day are apt to confine their reading too much to elementary treatises. The utility of these cannot be doubted; but the reports are the true repositories of the law, and of these none are so interesting and so convincing as those which are graced by the persuasive judgments of Lord Mansfield.

The principal improvements in the law during the period which has last past under review, may be summed up under the following heads. 1st, A more enlarged and liberal interpretation of contracts; 2d, The adoption of the great principles of commercial law, borrowed from the usages of merchants, the dissertations and commentaries of foreign jurists, and the inductions of philosophical inquiry; 3d, The enlargement of the remedy by assumpsit, moulding it, as in the action for money had and received, to the most important purposes of a bill in equity; 4th, The reducing of many doctrines of the law to systematical accuracy, by rejecting anomalies, and defining and limiting their application by the test of general reasoning.

Without doubt many of these changes were brought about by the enterprise of commerce, and the philosophizing spirit of the times. The former rendered indispensable the introduction of many general principles to regulate the complicated business of trade, and to protect and encourage navigation. The latter, by accustoming the profession to more comprehensive argumentation, and more perfect generalizations, gradually wore away that exclusive devotion to

technical rules and ancient practices, and the narrow policy of the old law, which had been for ages the reproach of the Benchers of Westminster Hall. The common law had its origin in ignorant and barbarous ages; it abounded with artificial distinctions and crafty subtleties, partly from the scholastic habits of its early clerical professors, and partly from its subserviency to the narrow purposes of feudal polity. When this polity began to decline, the mass of its principles was so interwoven into the texture of the law, and so consecrated by authority, that it became dangerous, if not impracticable, to disentangle it. There was, therefore, a natural jealousy of changes, lest they should work mischiefs in the venerable fabric. It was not until the current of society had taken a new direction, and commerce had worn its channels wide and deep through the whole country, that the necessities of trade compelled the profession to look abroad for doctrines of more general application. Yet it cannot be denied, that the progress of improvement was slow, and that the genius of Lord Mansfield, by outstripping that of the age at least a half century, accomplished, with brilliant success, what a few may have ventured to hope for, but no one before him was bold enough to execute. The remarks of Mr Justice Buller, a proud name in the English law, in the case of Lickbarrow *v.* Mason, fully confirm the views that I have attempted to unfold. "Before that period," says he, "we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to the jury, and

they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration of the strength and stretch of the human understanding."

Although the causes to which I have alluded contributed in a high degree to the advancement of the law, yet there is another which, in my judgment, had a decided, though silent, operation in its favour. I refer to the change in the tenure of office, by which the judges, instead of being dependent on the pleasure of the Crown, enjoyed their offices during good behaviour. This measure of consummate wisdom forms a part of the solemn act of settlement, which fixed the succession of the throne of England in the house of Hanover, and was adopted not merely to secure the personal independence of the judges, but the purity and independence of the law. The first effect was to check the undue influence of the Crown through its judicial patronage; the next, and not least important, was to restrain the tumultuary excitements of the people. Men, for the most part, are willing to submit to the laws, when faithfully and impartially administered. If they are satisfied that the judges are incorruptible, they acquiesce in their decisions, even when they may suspect them to be erroneous, as the necessary homage by which their own rights

and liberties are permanently secured. But if the fountain of justice is impure, and sends forth bitter waters, stained by influences which are not avowed, and yet are scarcely covered ; if judges are removed at pleasure, and appointed at pleasure, to gratify a favourite or a faction, an arrogant minister or a violent House of Commons, it is easy to foresee, that jealousy will lead to distrust, and distrust to hatred, and hatred to disobedience, and disobedience to resistance, which, if it stops short of treason, will yet utter itself in deep complaints, until public confidence is universally shaken, and armies become necessary to support the execution of the laws. Considerations of this sort have always impressed me with the belief, from the first moment that I ventured into the deeper studies of the law, that the independence of the judges is the great bulwark of public liberty, and the great security of property ; and that the revolution of 1688 would have been put a vain and passing pageant, a noble but ineffectual struggle against prerogative, if the triumph of its principles had not been secured by this practical means of enforcing them. Throughout the reigns of both the Charleses and both the Jameses, it is melancholy to remark the perpetual changes on the bench, induced by favouritism, or discontent, or an attempt to overawe the courts. The noble answer of Lord Coke to the inquiry of the king in the dispute about commendams, what he would do if the Crown, in any case before him, required the judges to stay proceedings, "that he would do that which would befit a judge to do," is worthy of everlasting

remembrance. But it was his solitary answer. To the disgrace of the age, all the other judges, intimidated by the king and his haughty chancellor, "the wisest, greatest, meanest of mankind," promised implicit submission to the commands of the Crown. And even Lord Coke, for his conduct on other occasions, drew from the king the bitter, though perhaps unjust, rebuke, "that he was the fittest instrument for a tyrant that ever was in England." In the reign of Charles II., the conduct of the Crown was more openly profligate, and its influence exerted to affect the judgments of the courts, even in private suits. It is matter of history, that Sir Edmund Saunders, after having advised the proceedings in the Quo Warranto against the city of London, was promoted to the Chief Justiceship of the King's Bench, not on account of his talents, his learning, or his virtues, but on account of his known devotion to the interests of the Crown. Such are some of the more offensive forms, under which the tenure of offices during pleasure will sometimes exhibit men, from whose elevation of character better things might be expected. But the more silent and unobtrusive influence of *popular* dependence, though less striking to the vulgar eye, is not less subversive of the great purposes of justice. It is indeed more dangerous to the liberty and property of the people, since it assumes the attractive appearance of obedience to the will of the majority, and thus, without exciting jealousy or alarm, tramples under foot all those who refuse to obey the idol of the day. How can it be reasonably expected, that

the law should flourish as a science, when the judges are doomed to resist the humours of the prince, or the clamours of the populace, at the peril of those stations which may constitute their only refuge from pecuniary distress?

If the old tenure of office had remained, we might still have possessed many valuable judgments of the later common law judges. But we should have searched in vain for those bright displays of independence and virtue, for those beautiful arguments in defence of private rights, for those finished illustrations of pure and exalted equity, and for those comprehensive commentaries upon commercial law, which have immortalized their memories. If their places were of any value, they must have resigned them, or remained the timid followers of the old law, without the ambition to improve its doctrines, or the hardihood to encounter the alarm of innovation. Lord Mansfield would scarcely have sustained himself on the bench, in the midst of so many political and professional foes, to utter the thrilling declaration, "I wish for popularity; but it is that popularity which follows, not that which is run after. It is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends by noble means. I will not do that which my conscience tells me is wrong upon this occasion, to gain the huzzas of thousands, or the daily praise of all the papers which come from the press. I will not avoid doing that which I think is right, though it should draw on me the whole artillery of libels, all that falsehood and malice can invent, or the

credulity of a deluded populace can swallow. I can say with another great magistrate, upon an occasion and under circumstances not unlike, Ego hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam, putarem."

The review, which has been hitherto sketched of the history of the common law, however imperfectly, is confined altogether to British jurisprudence. Before the American Revolution, from a variety of causes which it is not difficult to enumerate, our progress in the law was slow, though not slower perhaps than in the other departments of science. The resources of the country were small, the population was scattered, the business of the courts was limited, the compensation for professional services was moderate, and the judges were not generally selected from those who were learned in the law. The colonial system restrained our foreign commerce, and as the principal trade was to or through the mother country, our most important contracts began or ended there. That there were learned men in the profession in those times, it is not necessary to deny. But the number was small, and from the nature of the business which occupied the courts, the knowledge required for common use was neither very ample nor very difficult. The very moderate law libraries then to be found in the country would completely establish this fact, if it could be seriously controverted. Our land titles were simple. Our contracts principally sprung up from the ordinary relations of debtor and creditor. Our torts were cast in the common mould of trespasses to lands, or

goods, or personal injuries; and the most important discussions grew out of our provincial statutes. Great lawyers do not usually flourish under such auspices, and great judges still more rarely. Why should one accomplish himself in that learning, which is more of curiosity than use? which neither adds to fame nor wealth? which is not publicly sought for or admired? which devotes life to pursuits and refinements not belonging to our own age or country? The few manuscripts of adjudged cases which now remain, confirm these remarks. If here and there a learned argument appears, it strikes us with surprise rather from its rarity than its extraordinary authority. In the whole series of our Reports there are very few cases, in which the ante-revolutionary law has either illustrated or settled an adjudication.

The progress of jurisprudence since the termination of the War of Independence, and especially within the last twenty years, has been remarkable throughout all America. More than 150 volumes of reports are already published, containing a mass of decisions which evinces uncommon devotion to the study of the law, and uncommon ambition to acquire the highest professional character. The best of our reports scarcely shrink from a comparison with those of England in the corresponding period; and even those of a more provincial cast exhibit researches of no mean extent, and presage future excellence. The danger, indeed, seems to be, not that we shall hereafter want able reports, but that we shall be overwhelmed with their number and variety.

In this respect our country presents a subject of very serious contemplation and interest to the profession. There are now twenty-four States in the Union, in all of which, except Louisiana, the common law is the acknowledged basis of their jurisprudence. Yet this jurisprudence, partly by statute, partly by judicial interpretations, and partly by local usages and peculiarities, is perpetually receding farther and farther from the common standard. While the States retain their independent sovereignties, as they must continue to do under our federative system, it is hopeless to expect that any greater uniformity will exist in the future than in the past. Nor do I know that, so far as domestic happiness and political convenience are concerned, a greater uniformity would in most respects be desirable. The task, however, of administering justice in the state as well as national courts, from the new and peculiar relations of our system, must be very laborious and perplexing; and the conflict of opinion upon general questions of law in the rival jurisdictions of the different States, will not be less distressing to the philosophical jurist, than to the practical lawyer.

It may not be without utility to glance for a few moments at some of those circumstances, in which the coincidences and differences are most striking and instructive.

1. And first, as to the regulation of the transfers of property. These are either by the descent and distribution of estates, by conveyances *inter vivos*, or by testamentary dispositions. As to the first, so far

as my knowledge extends, the canons of descent in the direct line are the same in all the States. In all the States the children and lineal descendants inherit in coparcenry, without any distinction as to primogeniture or sex. In descents in the collateral line, there are some peculiar modifications in almost all the States. In some States there is a difference between the half and the whole blood; in others, a difference between inheritances *ex parte paterna* and *ex parte materna*; in others, a difference in the order of succession and representation. From the genius of our political institutions, as well as the habits of the people, there is every probability that inheritances will continue to descend substantially in the same manner, as long as our free governments endure. An attempt to establish the English canons of descent could hardly succeed, but upon the ruins of all those institutions which are considered the best protection of a republican government. Then, as to conveyances *inter vivos*. Lands are universally conveyed by a deed, acknowledged by the parties before some competent magistrate, and recorded in some public records kept for the registry of conveyances of this nature. The ceremony of livery of seizin is obsolete, if indeed it have anywhere a legal entity. The common law forms of conveyance are in general use, and the statute of Uses being recognised as a part of the common or statute law of the States, the English doctrines on these subjects are generally adopted. As to testamentary dispositions. Lands are universally disposable by will. The ceremonies, by which solemn tes-

taments are evidenced in most of the States, do not materially differ from the English statute on this subject. In Virginia and Kentucky, however, a will wholly written and signed by the testator is good, although there is no subscribing witness. In Louisiana the like provision exists; and it is to be observed, that the preceding remarks are in general inapplicable to this State, whose jurisprudence being founded on the civil law, the forms of conveyances, whether they be donations *inter vivos*, or donations *causa mortis*, are regulated in general conformity to the rule of that law.

2. As to commercial law. From mutual comity, from the natural tendency of maritime usages to assimilation, and from mutual convenience, if not necessity, it may reasonably be expected, that the maritime law will gradually approximate to a high degree of uniformity throughout the commercial world. This is indeed in every view exceedingly desirable. Europe is already, by a silent but steady course, fast approaching to that state, in which the same commercial principles will constitute a part of the public law of all its sovereignties. The unwritten commercial law of England at this moment, differs in no very important particulars from the positive codes of France and Holland. Spain, Portugal, and the Italian States, the Hanseatic Confederacy, and the powers of the North, have adopted a considerable part of the same system; and the general disposition in the Maritime States to acknowledge the superiority of the courts and code of England, leaves little doubt that their

own local usages will soon yield to her more enlightened doctrines. What a magnificent spectacle will it be to witness the establishment of such a beautiful system of juridical ethics,—to realize, not the oppressive schemes of holy alliances in a general conspiracy against the rights of mankind, but the universal empire of juridical reason, mingling with the concerns of commerce throughout the world, and imparting its beneficent light to the dark regions of the poles, and the soft and luxurious climates of the tropics. Then, indeed, would be realized the splendid visions of Cicero, dreaming over the majestic fragments of his perfect republic, and Hooker's sublime personification of the law would stand forth almost as embodied truth, for "all things in heaven and earth would do her homage, the very least as feeling her care, and the greatest as not exempted from her power."

The commercial law of the Atlantic States has indeed already attained to a very striking similarity in its elements. Upon the subject of insurance there is no known difference founded on local usages or statutes. If the law be differently administered, it is not because there is any intention to deviate from the general doctrines of that law, but because the nature and extent of those doctrines have been differently understood. In all the States the same law prevails as to contracts of shipping and affreightment. In most of the States bills of exchange and promissory notes are negotiable, and rest upon the principles which, since the statute of Anne, have won their way

into the common law. Virginia affords the most striking exception to this remark; for there a limited negotiability only is recognised by law, and parties, who are remote indorsers, have no remedy against remote indorsers except by a suit in equity. Massachusetts, as far as I know, stands alone in her local usage of denying days of grace to promissory notes, unless expressed on the face of the contract. And it is seriously wished, that by a legislative act we might fairly get rid of this anomaly, which has not a single ground either of convenience or policy, or antiquity to recommend it.* There are some few other dissonances from the general commercial law, which have existed in some of the States, but it would serve no important purpose to explain them at this time.

3. As to remedies, it would be endless to point out the coincidences and differences between the various States. Remedies are necessarily modified by the wants and manners of the community, and processes, which from habit are thought useful and convenient in one state of society, are rejected as burthensome and injurious in another. In several of the New England States the attachment of real and personal property is allowed upon mesne process, not merely to coerce the appearance of the defendant, but to secure a final satisfaction of the judgment, if the plaintiff recovers in the suit. This process, except so far

* Since this address was delivered, a statute has been passed in Massachusetts, providing that grace shall be allowed on all promissory notes, orders, and drafts, payable at a future day certain, in which there is not an express stipulation to the contrary. St. Mass. 1824, c. 130.

as it belongs to foreign attachments (analogous to our trustee process) is utterly unknown elsewhere, and the existence of it among ourselves is contemplated with surprise and regret by those who are accustomed to the general processes of the common law. It is thought a hardship, that any person should be liable to be stripped of his property, before it is ascertained judicially that a good cause of action exists against him, and the danger of abuse has been dwelt upon with much emphasis and force. And yet perhaps the annals of no country present fewer instances of abuse than those of the New England States, which allow this mode of proceeding. Personal arrests are rare here, even when property is not to be found; and it is not perhaps hazarding too much to assert, that the writ of capias has subjected more persons to wrongful imprisonment, than the unjust attachment of property has to serious loss and inconvenience. Yet it cannot be denied, that the latter process is liable to great abuses, and that our exemption from them has resulted principally from the sound discretion and integrity of the Bar. And it is most desirable, that some summary practice, analogous to that of discharging on common bail, should be authorized by the legislature, so that fraud and circumvention and oppression may find it more difficult to obtain undue advantages, and compel undue compromises under the influence of this dreaded process.

The remedy for trying land titles in all the States in the Union, except Louisiana and some of the New England States, is the English action of ejectment. It

is scarcely modified even in its slightest forms, and John Doe and Richard Roe are the familiar guests, *hospites antiqui et constantes*, of the courts on the picturesque banks of the Hudson, the broad expanse of the Delaware and Chesapeake, the sunny regions of the south, and the fertile vales and majestic rivers of the west. In Louisiana, the civil law governs all judicial proceedings, and administers all remedies *in personam* and *in rem*. And I cannot help paying my humble homage to the excellence of this code, which, adapting its remedies to the exigency of the case, gives complete relief without trammelling itself with prescribed forms, which often perplex, and sometimes defeat, the ends of justice. In one or two of the adjoining States, the old anomalous proceeding, known as a plea in ejectment, still prevails. The use of writs of entry for the trial of land titles is, I believe, unknown, except in Massachusetts, Maine, and New Hampshire. Whether we have derived any important benefit from the revival of the old forms of proceeding in real actions, is a question upon which wise men and sound lawyers may probably disagree. If we have disembarrassed them of some troublesome appendages and some artificial niceties, and rendered them more attractive by the simplicity of their structure, still it must be confessed that they are not easily moulded to all the uses which modern conveyances and devises render convenient and necessary. The abandonment of these forms in England, from a general sense of their inadequacy to the purposes of justice, and the adoption there, as well as in most of

the American States, of the action of ejectment, which has been ascertained by experience to be a perfect and convenient remedy, do certainly carry a weight of authority against our own practice, which, if it be not difficult to resist, it would at least be safe to follow.

4. As to the structure of land titles, there is a considerable diversity in the States, and in several of them a great departure from the simplicity and certainty of those derived under the common law. I am not aware that in any part of New England any serious difficulties are to be found on this subject, all titles having had their origin in separate grants derived directly from the government or confirmed by it, and having the usual formalities and certainty of grants of the crown at common law, or of grants by private legislative acts. The only questions which have been much litigated are those of boundary, which may and do ordinarily arise under grants between private persons, and of these there have been few of any considerable magnitude. Far different has been the course of proceeding in some other parts of the Union. Titles there have originated in general laws, under which any person might appropriate the property of the state by following the regulations pointed out by certain statutable provisions. These provisions are very complex, and embrace a variety of stages of title, in each of which the purchaser is obliged to observe great precision, or his rights may be postponed to a puisne holder or claimant. As, therefore, the titles stand upon general

laws, and by taking steps to acquire them inchoate rights are obtained, or priorities secured, before the titles are consummated by grants from the government, many very difficult questions have grown up as to the nature, extent, validity, and priority of conflicting titles. A regular grant or patent from the government is no security against other claimants, although it should happen to be prior in point of date to all others. It is liable to be overreached and defeated, sometimes at law and sometimes in equity, according to the local jurisprudence, by prior inchoate rights or equitable claims, whether arising under preemptions, or settlements, or entries, or other matters, which have been held to confer upon an adverse claimant a legal preference. These remarks apply with considerable force to the land laws of Pennsylvania, Maryland, North Carolina, and Tennessee. But it is in Virginia, and more especially in Kentucky, which derives its titles under the Virginia land laws, that they are realized in their fullest extent. The system of land titles in Kentucky is indeed one of the most abstruse branches of local jurisprudence, built up on artificial principles, singularly acute and metaphysical, and quite as curious and intricate as some of the higher doctrines of contingent remainders and executory devises. It affords an illustrious example of human infirmity and human ingenuity: of human infirmity in the legislative supposition, that the great statute on which it rests was so certain, as in a great measure to preclude future litigation; of human ingenuity in overcoming obstacles

apparently insurmountable, by devising approximations to certainty in descriptions strangely vague and inaccurate, thus preserving the legislative intention, and yet promoting the great purposes of justice. The vice of the original system consisted in enabling any persons to appropriate the lands of the state by entries and descriptions of their own, without any previous survey under public authority, and without any such boundaries as were precise, permanent, and unquestionable; and the issuing of grants upon such entries without any inquiry as to the true nature, description, and survey of the lands, and without any attempt to prevent duplicate grants of the same property. If we consider, that Kentucky was at this time a wilderness traversed principally by hunters; that many places must have been but very imperfectly known even to them, and must have received different appellations from occasional and disconnected visitants; if we consider, that the lands were rich, and the spirit of speculation was pushed to a most extravagant extent, and that the spirit of fraud, as is but too common, followed close upon the heels of speculation; if we consider the infinite diversity which under such circumstances must unavoidably exist in the descriptions of the appropriated tracts of land, arising from ignorance, or carelessness, or innocent mistake, or fraud, or personal rashness—we ought not to be surprised at the fact, that the best part of Kentucky is oppressed by conflicting titles, and that in many instances there are three layers of them lapping on or covering each other. The statute to which I

have alluded required, that the description in the original entry should be so certain, that other purchasers might be able to appropriate the adjacent residuum. The description of the tract might fail in two particulars. *First*, It might be bounded by known objects or boundaries, but yet so general and imperfect, that the description might equally well suit different tracts of land, and thus want what has been technically called "identity." *Second*, Or the boundaries might refer to objects so universal as to defy all certainty, or to objects not generally known at the time by the particular names given to them, or known generally by another name; and then the description would be fatally defective for want of what is technically called "notoriety." Time would fail me to enumerate the doctrines which have started from this origin, or to go over other peculiarities of the system. Perhaps human genius has been rarely more severely tasked, or more fairly rewarded, than in its labours on this occasion. The land law of Kentucky, while it stands alone in its subtle and refined distinctions, has attained a symmetry, which at this moment enables it to be studied almost with scientific precision. But ages will probably elapse before the litigations founded on it will be closed; and so little assistance can be gained from the lights of the common law for its comprehension, that to the lawyers of other states it will for ever remain an unknown code with a peculiar dialect, to be explored and studied like the jurisprudence of some foreign nation.

In order to avoid such serious evils, the govern-

ment of the United States, with a wisdom and foresight which entitle it to the highest praise, has, in the system of land laws which regulate the sales of its own territorial demesnes, given great certainty, simplicity, and uniformity to the titles derived under it. With a few unimportant exceptions, all lands are surveyed before they are offered for sale. They are surveyed in ranges, and are divided into townships each six miles square, and these are subdivided into thirty-six sections, each one mile square, containing six hundred and forty acres. All the dividing lines run to the cardinal points, and of course intersect each other at right angles, except where fractional sections are formed by navigable rivers, or by an Indian boundary line. The subdividing lines of quarter sections are not actually surveyed, but the corners, boundaries, and contents of these are designated and ascertained by fixed rules prescribed by law; and regular maps of all the surveys are lodged in the proper departments of the government. In this manner, with some few exceptions, the public lands in Alabama, Mississippi, Louisiana, Ohio, Indiana, and Illinois, have been sold; and the system applies universally to all our remaining territorial possessions. The common law doctrines have, in respect to these titles, taken deep root and flourished; and the waters, which divide the states on the opposite banks of the Ohio, do not form a more permanent boundary of their respective territorial possessions, than the different origin of their land titles does in the character of their local jurisprudence.

5. Another circumstance, which will probably continue to form a leading diversity in the jurisprudence of the States, is the existence of slavery. This condition of society must necessarily involve a great variety of peculiar provisions as to domestic policy and foreign intercourse, as to crimes, rights, and duties, to which no parallel can be furnished in States whose constitutions or laws prohibit its introduction and existence. The property in slaves, partaking as it does of the double aspects of real and personal estate, being transmissible by descent, and being sold as personalty; being perpetually in demand and marketable, and of course affording solid revenue and wealth; giving value to lands by increasing the culture of agricultural products; being also of intrinsic value and general necessity in climates, where little or nothing is accomplished by other labour;—it follows, that slavery and its appendages must sink deep into the mass of jurisprudence of the slave-holding states, and furnish much litigation in the shape of contracts, conveyances, torts, or crimes, which other states are happily exempt from, and need not study, either for admonition or instruction.

6. Another diversity, which deserves attention, is the equity jurisdiction, which exists in complete operation in some States, in partial operation in others, and in others again is obsolete, or totally prohibited. In New England no such establishment is known as a separate independent court of equity. In Connecticut and Vermont general equity powers are exercised by the judges of their superior courts; but in

all the other New England States equity powers are confined to a few cases, which are specified and limited by legislative acts. In Pennsylvania a mixed system exists. No Court of Chancery, or court exercising chancery powers according to the forms and proceedings of that jurisdiction, is known. But in cases where the parties possess rights, which a Court of Equity would recognise and enforce, Courts of Law, following equity in this particular, endeavour to give efficacy to these rights through the instrumentality of remedies at law. Thus, a title to land merely equitable, or resting in a contract, of which a Court of Equity would compel a specific performance, is sufficient to sustain an ejectment at law. On the other hand, in New York, New Jersey, Maryland, Virginia, and South Carolina, Courts of Equity have a distinct existence and organization, independent of Courts of Common Law; and, as far as I have been enabled to learn, in the remaining States the equity jurisdiction is generally administered by the Courts of Common Law. Wherever the equity jurisdiction is exercised, its admitted basis is the general doctrines of the English Chancery. But it is so modified by local statutes, usages, and decisions, that it would be somewhat hazardous for a lawyer at the chancery bar of Westminster to form an opinion as to the authority to give or to deny relief, however unequivocally those guides might speak, whom he was accustomed to consult.

If I were obliged to speak from my own very imperfect knowledge and experience, I should be com-

pelled to declare, that the deviations in America from the established principles of equity were far more considerable than from those of the common law. A more broad and undefined discretion has been assumed, and a less stringent obedience to the dictates of authority. Much is left to the habits of thinking of the particular judge, and more to that undefined notion of right and wrong, of hardship and inconvenience, which popular opinions alternately create and justify. There are indeed illustrious exceptions to these remarks, which it were invidious to point out, though it be of great importance to follow.

The slight sketches which I have ventured thus to draw of some of the prominent features of state jurisprudence, do, as I think, justify the suggestion already made, that American jurisprudence can never acquire a homogeneous character; and that we must look to the future rather for increasing discrepancies than coincidences in the law and the administration of the law. This is a consideration of no small moment to us all, lest, by being split up into distinct provincial bars, the profession should become devoted to mere state jurisprudence, and abandon those more enlightened and extensive researches which form the accomplished scholar, and elevate the refined jurist; which ennoble the patriot, and shed a never dying lustre round the statesman. The establishment of the national government, and of courts to exercise its constitutional jurisdiction, will, it is to be hoped, in this respect, operate with a salutary influence. Dealing, as such courts must, in questions of a public na-

ture; such as concerns the law of nations, and the general rights and duties of foreign nations; such as respect the domestic relations of the states with each other, and with the general government; such as treat of the great doctrines of prize and maritime law; such as involve the discussion of grave constitutional powers and authorities;—it is natural to expect, that these courts will attract the ambition of some of the ablest lawyers in the different states, with a view both to fame and fortune. And thus, perhaps, if I do not indulge in an idle dream, the foundations may be laid for a character of excellence and professional ability, more various and exalted than has hitherto belonged to any bar under the auspices of the common law; a character in which minute knowledge of local law will be combined with the most profound attainments in general jurisprudence, and with that instructive eloquence, which never soars so high, or touches so potently, as when it grasps principles which fix the destiny of nations, or strike down to the very roots of civil polity.

In comparing the extent of American jurisprudence with that of England, we shall find that if in some respects it is more narrow, in others it is more comprehensive. The whole ecclesiastical law of England, unless so far as it may operate on past cases, is obsolete. The genius of our institutions has universally prohibited any religious establishment, state or national. Nor is there the slightest reason to presume that the imposition of tithes could ever be successfully introduced here, except by the strong arm of

martial law, forcing its way by conquest. It was always resisted during our colonial dependency, and would now be thought at war with all that we prize in religion or civil freedom. The numerous questions respecting tithes and moduses, quare impedits, and advowsons and presentations, the fruitful progeny of that establishment, are gone to the same tomb, where the feudal tenures repose in their robes of state in dim and ancient majesty. In the next place, the right of primogeniture being abolished, and all estates descending in coparceny, and entails being practically changed into fee simple estates, there is no necessity for those intricate conveyances, settlements, and devises, with which the anxiety of parents and friends to provide against the inconveniences of the law have filled all the courts of England. Of this troubled stream of controversy we may indeed say, "it flows, and flows, and flows, and ever will flow on." In the next place, we are rid not only of the feudal services and tenures, but of all the customary law of our parent country, the ancient demesnes, the copyholds, the manorial customs and rights, and the customs of gavelkind and borough English. The cases in which prerogative or privilege can arise are few, and limited by law. Long terms and leases, and annuities charged on land, are rare among us; and the complicated questions of contract and of rent, which fill the books, are of course scarcely heard of in our courts. We have no game laws to harass our peasantry, or to form an odious distinction for our gentlemen; and the melancholy inventions of later times

connected with them, the spring-guns, and the concealed spears, and the man-traps, never cross our paths, or disturb our fancies. The penalties of a præmunire cannot be incurred, for we neither court nor fear papal bulls or excommunications. Outlawry, as a civil process, if it have a legal entity, is almost unknown in practice. An appeal of death or robbery never drew its breath among us; nor can it now be brought forth to battle in its dark array of armour, to astonish and confuse us, as it recently did all Westminster Hall. These are no small departments of the common law. A few of them, indeed, are almost obsolete in England; but the residue forms a body of principles so artificial and so difficult, that they leave behind them few which can, in these respects, justly claim precedency.

With all these abridgments, however, our law is still sufficiently extensive to occupy all the time, and employ all the talents, and exhaust all the learning, of our ablest lawyers and judges. The studies of twenty years leave much behind that is yet to be grappled with and mastered. And if the law of a single state is enough for a long life of labour and ambition, the task falls still heavier on those who frequent the National Courts, and are obliged to learn other branches of law, which are almost exclusively cognizable there. When it is considered that the equity jurisprudence of the courts of the United States is like that of England, with the occasional adoption of the peculiar equities of local law; and their admiralty jurisdiction takes in its circuit not

merely the prize and maritime law, but seizures also for the breach of municipal regulations; when to these are added the interpretation of the treaties and statutes of the United States, and the still more grave discussion of constitutional questions, and the relative rights of states, and their citizens, in respect to other states,—it cannot well be doubted that the administration of justice is there filled with perplexities that strain the human mind to its utmost bearings.

The most delicate, and at the same time the proudest, attribute of American jurisprudence, is the right of its judicial tribunals to decide questions of constitutional law. In other governments, these questions cannot be entertained or decided by courts of justice; and therefore, whatever may be the theory of the constitution, the legislative authority is practically omnipotent, and there is no means of contesting the legality or justice of a law, but by an appeal to arms. This can be done only when oppression weighs heavily and grievously on the whole people, and is then resisted by all, because it is felt by all. But the oppression that strikes at an humble individual, though it robs him of character, or fortune, or life, is remediless; and, if it becomes the subject of judicial inquiry, judges may lament, but cannot resist, the mandates of the legislature.

Far different is the case in our country; and the privilege of bringing every law to the test of the constitution belongs to the humblest citizen, who owes no obedience to any legislative act, which transcends the constitutional limits. Some visionary statesmen,

indeed, who affect to believe that the legislature can do no wrong, and some zealous leaders, who affect to believe that popular opinion is the voice of unerring wisdom, have at times questioned this authority of courts of justice. If they were correct in their doctrine, we might as well be without a written constitution of government, since the minority would always be in complete subjection to the majority; and it is to be feared that the experience of mankind has never shewn that the despotism of numbers has been more mild or equitable than that swayed by a single hand. This heresy, as questionable in point of sound policy, as it is unconstitutional in its language, has hitherto made but little progress among us. The wise, and the learned, and the virtuous, have been nearly unanimous in supporting that doctrine, which courts of justice have uniformly asserted, that the constitution is not the law for the legislature only, but is the law, and the supreme law, which is to direct and control all judicial proceedings.

The discussion of constitutional questions throws a lustre round the Bar, and gives a dignity to its functions, which can rarely belong to the profession in any other country. Lawyers are here emphatically placed as sentinels upon the outposts of the constitution; and no nobler end can be proposed for their ambition or patriotism, than to stand as faithful guardians of the constitution, ready to defend its legitimate powers, and to stay the arm of legislative, executive, or popular oppression. If their eloquence can charm, when it vindicates the innocent and the

suffering under private wrongs; if their learning and genius can, with almost superhuman witchery, unfold the mazes and intricacies by which the minute links of title are chained to the adamantine pillars of the law,—how much more glory belongs to them, when this eloquence, this learning, and this genius, are employed in defence of their country; when they breathe forth the purest spirit of morality and virtue in support of the rights of mankind; when they expound the lofty doctrines which sustain, and connect, and guide the destinies of nations; when they combat popular delusions at the expense of fame, and friendship, and political honours; when they triumph by arresting the progress of error and the march of power, and drive back the torrent that threatens destruction equally to public liberty and to private property, to all that delights us in private life, and all that gives grace and authority in public office.

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Something more I would say on this subject, but time fails me, and I feel that I am entering on topics far too grave, and solemn, and delicate, for occasions like the present. May I be permitted, however, to say, that the duty devolved upon the profession in these times is of deep responsibility and interest. It depends upon the present age, whether the national constitution shall descend to our children in its masculine majesty, to protect and unite the country; or whether, shorn of its strength, it shall become an idle mockery, and perish before the grave has closed upon the last of its illustrious founders.

In looking to the future prospects of the jurisprudence of our country, it appears to me that the principal improvements must arise from a more thorough and deep-laid juridical education, a more exact preparatory discipline, and a more methodical and extensive range of studies.

In the first place, it cannot be disguised that we are far behind the English Bar in our knowledge of the practice, and of the elementary forms and doctrines, of special pleading. I do not speak here of the technical refinements of the old law in special pleading, which the good sense of modern times has suppressed; but of those general principles which constitute the foundation of actions, and of those forms by which alone rights and remedies are successfully pursued. There is a looseness and inartificial structure in our declarations, and other pleadings, which betray an imperfect knowledge both of principles and forms; an aberration from settled and technical phraseology, and a neglect of appropriate averments, which not only deprive our pleadings of just pretension to elegance and symmetry, but subject them to the coarser imputation of slovenliness. The forms of pleading are not, as some may rashly suppose, mere trivial forms: they not unfrequently involve the essence of the defence; and the discipline which is acquired by a minute attention to their structure is so far from being lost labour, that it probably, more than all other employments, leads the student to that close and systematical logic, by which success in the profession is almost always secured. Of the great lawyers and

judges of the English Forum, one can scarcely be named who was not distinguished by uncommon depth of learning in this branch of the law, and many have risen to celebrity solely by their attainments in it. We should blush to be accused of perpetual mistakes in grammatical construction, or of a gross and unclassical style of composition. Yet these are venial errors, compared with those with which the law is sometimes reproached. Diffuse and tedious as are the modern English pleadings, it cannot be denied that they exhibit a thorough mastery of the science. We miss, indeed, the close, lucid, and concentrated vigour of the pleadings in the days of Rastall, and Coke, and Plowden, and even of Saunders and Raymond. But our taste is not offended by loose and careless phraseology, or our understanding by omissions, which betray the genuine "crassa negligentia" of the law, or by surplusage so vicious and irrelevant, that one is at a loss to know at what point the pleadings aim, or whether they aim at any. We ought not to rest satisfied with mediocrity, when excellence is within our reach. The time is arrived when gentlemen should be scrupulously precise in their drafts of pleadings, and when the records of our courts should not be deformed by proceedings which could not stand the most rigorous scrutiny of the common law in form as well as in substance. Exemplifications of our judgments may pass, nay, do already pass, to England, and it ought to be our pride to know that they will not be disgraced under the inspection of the sober benchers of any Inn of Court. We should

study ancient forms and cases, as we study the old English writers in general literature; because we may extract from them not only solid sense, but the best examples of pure and undefiled language. There is a better reason still, and that is, that special pleading contains the quintessence of the law, and no man ever mastered it who was not, by that very means, made a profound lawyer.

Another source of improvement is in the more general study of the doctrines of Courts of Equity. I do not here address myself to those who expect to practise in such courts, for to them it is almost unnecessary to say that the study is indispensable. But I address the remark to those who are conversant only with Courts of Common Law. The principles of equity jurisprudence are of a very enlarged and elevated nature. They are essentially rational, and moulded into a degree of moral perfection, which the law has rarely aspired to. The arguments in courts of this sort abound with new views and elementary discussions. They present strong and brilliant contrasts to some of the perplexed notions of the old common law; and not unfrequently confirm and illustrate doctrines strictly legal, by unfolding new analogies, and expounding the nature and limits of principles, in a manner full of instruction and interest. It is a great mistake to confine our juridical researches to the narrow path in which we mean to trade. There is no great mind but that feels itself cramped and fettered by such a course; and no moderate mind but becomes ground up into the

most dusty professional pedantry. The great branches of jurisprudence mutually illustrate and support each other. The principles of one may often be employed with the most captivating felicity in aid of another; and in proportion as the common law becomes familiar with the lights of equity, its own code will become more useful and more enlightened. In our country, the study of equity jurisprudence has not, until within a few years, attracted general attention; and in New England, from causes which have been already alluded to, it has fallen into more neglect than our advances in other branches of the law would justify or excuse.

Connected with this, and as a mine abounding with the most precious materials, to adorn the edifice of our jurisprudence, is the study of the foreign maritime law, and above all of the civil law. Where shall we find more full and masterly discussions of maritime doctrines, coming home to our own bosoms and business, than in the celebrated commentaries of Valin? Where shall we find so complete and practical a treatise on insurance as in the mature labours of Emerigon? Where shall we find the law of contracts so extensively, so philosophically, and so persuasively expounded, as in the pure, moral, and classical treatises of Pothier? Where shall we find the general doctrines of commercial law so briefly, yet beautifully laid down, as in the modern commercial code of France? Where shall we find such ample general principles to guide us in new and difficult cases, as in that venerable deposite of the learning and labours of the jurists of the

ancient world, the Institutes and Pandects of Justinian? The whole continental jurisprudence rests upon this broad foundation of Roman wisdom; and the English common law, churlish and harsh as was its feudal education, has condescended silently to borrow many of its best principles from this enlightened code. (See 12 Mod. 482 by Lord Holt.) The law of contracts and personalty, of trusts, and legacies, and charities in England, have been formed into life by the soft solicitudes and devotion of her own neglected professors of the civil law.

There is no country on earth which has more to gain than ours by the thorough study of foreign jurisprudence. We can have no difficulty in adopting in new cases, such principles of the maritime and civil law as are adapted to our own wants, and commend themselves by their intrinsic convenience and equity. Let us not vainly imagine, that we have unlocked and exhausted all the stores of juridical wisdom and policy. Our jurisprudence is young and flexible, but it has withal a masculine character, which may be refined and exalted by the study of the best models of antiquity. And the structure of our State and National Governments, while it easily admits of the incorporation of foreign maritime principles, at the same time makes it safe, useful, and commendable.

There is yet another study, which may well engage the attention of American lawyers, and be, in the language of Lord Coke, both honourable and profitable to them,—I mean the study of the law of nations.

This is at all times the duty, and ought to be the pride, of all who aspire to be statesmen; and as many of our lawyers become legislators, it seems to be the study to which, of all others, they should most seriously devote themselves. Independent of these considerations, there is nothing that can give so high a finish, or so brilliant an ornament, or so extensive an instruction, as this pursuit, to a professional education. What, indeed, can tend more to exalt and purify the mind, than speculations upon the origin and extent of moral obligations; upon the great truths and dictates of natural law; upon the immutable principles that regulate right and wrong in social and private life, and upon the just applications of these to the intercourse and duties and contentions of independent nations? What can be of more transcendent dignity, or better fitted to employ the highest faculties of genius, than the development of those important truths which teach the duties of magistrates and people, the rights of peace and war, the limits of lawful hostility, the mutual duties of belligerent and neutral powers, and aim at the introduction into national affairs of that benign spirit of Christian virtue, which tempers the exercise even of acknowledged rights with mercy, humanity, and delicacy? If the science of jurisprudence be, as it has been eloquently described to be, "the pride of the human intellect," and "the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns," where can we find more striking proofs of its true excellence, than in the study of those

maxims which address themselves to the best interests and the most profound reflections of nations, and call upon them, as the instruments of providence, to administer to each other's wants, to check inordinate ambition, to support the weak, and to fence in human infirmity, so that it can scarcely transcend the bounds of established rules, without drawing after it universal indignation and resistance? Yet how few have mastered the elementary treatises on this subject, the labours of Albericus Gentilis, and Zouch, and Grotius, and Puffendorf, and Bynkershoek, and Wolfius, and Vattel? How few have read with becoming reverence and zeal the decisions of that splendid jurist, the ornament, I will not say of his own age or country, but of all ages and all countries; the intrepid supporter equally of neutral and belligerent rights; the pure and spotless magistrate of nations, who has administered the dictates of universal jurisprudence with so much dignity and discretion in the Prize and Instance Courts of England! Need I pronounce the name of Sir William Scott? How few have aspired, even in vision, after those comprehensive researches into the law of nations, which the introductory discourse of Sir James Mackintosh has opened and explained with such attractive elegance and truth?

Such are some of the studies from which American jurisprudence may, in my humble judgment, derive essential improvements; and I cannot but indulge the belief, that they will be eagerly sought and thoroughly examined by the good and the wise of succeeding ages.

The mass of the law is, to be sure, accumulating with an almost incredible rapidity, and with this accumulation, the labour of students, as well as professors, is seriously augmenting. It is impossible not to look without some discouragement upon the ponderous volumes, which the next half century will add to the groaning shelves of our jurists. The habits of generalization, which will be acquired and perfected by the liberal studies which I have ventured to recommend, will do something to avert the fearful calamity which threatens us of being buried alive, not in the catacombs, but in the labyrinths of the law. I know, indeed, of but one adequate remedy, and that is, by a gradual digest, under legislative authority, of those portions of our jurisprudence, which, under the forming hand of the judiciary, shall from time to time acquire scientific accuracy. By thus reducing to a text the exact principles of the law, we shall, in a great measure, get rid of the necessity of appealing to volumes, which contain jarring and discordant opinions; and thus we may pave the way to a general code, which will present in its positive and authoritative text the most material rules to guide the lawyer, the statesman, and the private citizen. It is obvious that such a digest can apply only to the law, as it has been applied to human concerns in past times; but by revision at distant periods, it may be made to reflect all the light which intermediate decisions may have thrown upon our jurisprudence. To attempt more than this would be a hopeless labour, if not an absurd project. We ought not to permit ourselves

to indulge in the theoretical extravagances of some well-meaning philosophical jurists, who believe that all human concerns for the future can be provided for in a code speaking a definite language. Sufficient for us will be the achievement, to reduce the past to order and certainty; and that this is within our reach cannot be matter of doubtful speculation. It has been already accomplished in a manner so triumphant, that no cavil has been able to lessen the fame of the authors. The Pandects of Justinian, imperfect as they are from the haste in which they were compiled, are a monument of imperishable glory to the wisdom of the age; and they gave to Rome, and to the civilized world, a system of civil maxims which have not been excelled in usefulness and equity. They superseded at once the immense collections of former times, and left them to perish in oblivion; so that, of all ante-Justinianean jurisprudence, little more remains than a few fragments, which are now and then recovered from the dust and rubbish of antiquity, in the *codices rescripti* of some venerable libraries. The modern code of France, embracing, as it does, the entire elements of her jurisprudence in the rights, duties, relations, and obligations of civil life; the exposition of the rules of contracts of every sort, including commercial contracts; the descent, distribution, and regulation of property; the definition and punishment of crimes; the ordinary and extraordinary police of the country, and the enumeration of the whole detail of civil and criminal practice and process,—is perhaps the most finished and methodical treatise of law

that the world ever saw. This code forms also the law of Holland, and, with comparatively few alterations, has been solemnly adopted as its fundamental law by the State of Louisiana. The materials of it were to be sought for among an almost infinite variety of provincial usages and customary laws, and were far more difficult to reduce into system, than any which belong to the common law. It is left to the future jurists of our country and England, to accomplish for the common law what has thus been so successfully demonstrated to be a practical problem in the jurisprudence of other nations,—a task which the modest but wonderful genius of Sir William Jones did not scruple to believe to be within the reach of a single mind successfully to accomplish.

I have thus endeavoured, not as I could wish, but as I have been able, amidst the cares of private life, and the distractions of official business, to give some imperfect sketches of the past history of the law, of its future prospects, and of the sources whence we may derive improvement. May I add, in the language of the eminent living jurist (Sir James Mackintosh, Introd. Disc. 51)* whom I have already cited, that "there is not, in my opinion, in the whole compass of human affairs, so noble a spectacle as that which is displayed in the progress of jurisprudence, where we may contemplate the cautious and unwearied exertions of a succession of wise men through a long course of ages, withdrawing every case, as it arises, from the dangerous power of discretion, and

* See Cabinet Library of Scarce and Celebrated Tracts, No. I.

subjecting it to inflexible rules, extending the dominion of justice and reason, and gradually contracting within the narrowest possible limits the domain of brutal force and of arbitrary will."

If, in the discussion of these topics, I have suggested a single hint that may cheer the student in his laborious devotion to the elements of the law, or have awakened in the mind of a single advocate another motive to quicken his eloquence or zeal, my humble labour will not be without its consolations. We are all bound by the strong ties of civil obligation, by professional character, by patriotic pride, and by moral feelings, to cultivate and extend this interesting science. No Bar in America is more justly entitled to public confidence, than that of my native State; and none may more justly claim respect for its moral, literary, and juridical elevation, than that which I have now the honour to address. Much, however, remains to be done to satisfy a just ambition for excellence; and every day's experience admonishes us that life is short and art is long, furnishing motives at once to excite our diligence, and to restrain an undue ardour in any human pursuit. When, indeed, I look round and contemplate the ravages which death has made during my own brief career, not only among the sages of the law, but among those in the fresh bloom of youth, just struggling for distinction, the consideration fills me with the most profound melancholy. Since we were convened here on the last anniversary, the modest and accomplished Gallison has closed his useful life, and buried with him many

a brilliant hope of his parents, friends, and country. I will not dwell upon his distinguished talents and virtues, his blameless innocence of life, his elevated piety, his unwearied diligence, his extensive learning, his ardent devotion to literature, his active benevolence, exhausting itself in good deeds, and "blushing to find it fame." You knew him well, and your sympathies have mingled with the tears and sorrows that embalm his memory. But I may propose him as an example polished, if not perfect, of that excellence which the studies I have this day ventured to recommend are calculated to produce. Tacitus has recorded with affectionate solicitude the life and character of Agricola. May I be permitted to borrow from his admirable page a single passage, to grace the memory of my lamented friend and pupil. "Placide quiescas, nosque, domum tuam, ab infirmo desiderio et muliebribus lamentis ad contemplationem virtutum tuarum voces, quas, neque lugeri, neque plangi, fas est; admiratione, te potius quam temporalibus laudibus, et, si natura suppeditet, æmulatione, decoremus. Is verus honos, ea conjunctissimi cujusque pietas."

We, too, must soon pass away to the tomb, where our friends and instructors, the Ameses, the Sullivans, and the Dexters, the Lowells, the Danas, the Parsonses, and the Sewalls, are gone before us. We cannot be indifferent to the fate of our children or our country, and the happiness, as well as the honour of both, is indissolubly connected with the faithful administration of justice. Nor ought we to disguise that that science, which has been the choice of our youth and

the ambition of our manhood, has much in its milder studies to soothe and cheer us in the infirmities of old age. Nor can it be deemed a human frailty, if, when we take our last farewell of the law, we "cast one longing, lingering look behind," and bless those rising lights which are destined to adorn our judicial tribunals, however dimly they may be descried by our fading vision.

May our successors in the profession look back upon our times, not without some kind regrets, and some tender recollections. May they cherish our memories with that gentle reverence which belongs to those who have laboured earnestly, though it may be humbly, for the advancement of the law. May they catch a holy enthusiasm from the review of our attainments, however limited they may be, which shall make them aspire after the loftiest possessions of human learning. And thus may they be enabled to advance our jurisprudence to that degree of perfection which shall make it a blessing and protection to our own country, and excite the just admiration of mankind.

JUDGMENT

PRONOUNCED IN THE

CONSISTORY COURT OF LONDON,

IN THE CASE OF

DALRYMPLE *v.* DALRYMPLE,

BY

THE RIGHT HON. SIR WILLIAM SCOTT,

JUDGE OF THE CONSISTORY COURT OF LONDON.

EDINBURGH:
THOMAS CLARK, Law-Bookseller.
MDCCCXXXVI.

PREFACE.

The celebrated case of Dalrymple, the wife, v. Dalrymple, the husband, was originally reported by, and is now republished with the permission of, Sir John Dodson—to whom the Publisher is deeply indebted for many valuable suggestions which he has done him the honour to make in forming this collection of Tracts on International Law. He flatters himself that in following these, and profiting by similar assistance, afforded him by other eminent Lawyers, he will be enabled to place in the hands of Students a series of Tracts on this highly important subject, which shall, in every point of view, merit their most attentive consideration.

An extract from the Preface to the original edition of the Report will serve as a suitable introduction to the judgment pronounced in this cause by the pre-eminently distinguished person who has been so recently removed from the scene of his learned labours.* We may, without the

* For the following facts and observations we are indebted to the Gentleman's Magazine of April last.

He was born at Heworth in the county of Durham on the 18th October 1745. He was the eldest son of William Scott, an eminent coal-fitter and merchant in Newcastle-upon Tyne, and Jane, his wife, daughter of Mr Henry Atkinson. He received the rudiments of his classical education at the Royal Grammar School in that town, under the able tuition of that able preceptor, the Rev. Hugh Moises, A.M.

In 1761, Mr Scott obtained a scholarship at Corpus Christi College, Oxford; on the 20th Nov. 1765, he took his degree as bachelor of arts; and on the 14th June 1765, he was admitted a fellow of University College on the 22d of March; in that year he was appointed one of the tutors of his college.

In 1773, he was elected to the office of Camden's Reader of Ancient Histories. This office he retained till 1785; his lectures were

fear of contradiction, assert, that while he lived no name was more revered—and now that he is dead—it may be confidently affirmed that as none has occupied, so none ever will occupy a higher niche in the Temple of Themis. He was at once the ornament and pride of his country, and the object of veneration to Foreign Jurists. "How few have read," says Mr Justice Story, a highly competent judge, "with becoming reverence and zeal the decisions of that splendid Jurist, the ornament, I will not say of his own age and country, but of all ages and all countries; the intrepid supporter of neutral and belligerent rights, the pure and spotless magistrate of nations." Another Foreign Jurist says, "To the fame of Sir William Scott it is not in our power to make any addition; it has diffused itself throughout the civilized world; and it is as imperishable as are

attended by the largest concourse of Academics ever known on similar occasions.

He took his degree of Doctor in Civil Law on 23d June 1779; in 1787, he was appointed King's Advocate-General, shortly after Judge of the Consistory Court of London, Vicar-General of the Province of Canterbury, and Master of the Faculties.

He was knighted September 3. 1788, and in 1798, became Judge of the High Court of Admiralty, and was sworn in as a Member of the Privy Council. In 1790, he was chosen M. P. for Downton; and in 1801, was elected as the representative for the University of Oxford.

Sir William Scott was created a Peer in 1821, and took the title of Lord Stowell. He retired from the Court of Admiralty in 1828, and from his other judicial appointments about the same time.

Fortified by a store of knowledge at once profound and multifarious, combining all the materials that indefatigable research, close and minute observation, and intense study could provide for the supply of an acute, vigorous, and capacious mind, the judgments of Lord Stowell in the several courts in which he presided are universally estimated as models of sound and powerful reasoning, and of the purest classical eloquence. Devoting his brilliant talents and extraordinary acumen to the noblest branch of his profession—the study of international law—and living in times when a general war called all his knowledge into action, his decisions have passed into precedents equal, if not superior, in authority to those of the venerable fathers of the science, Puffendorf, Grotius, Vattel, &c.

His Lordship died on the 28th January 1836, at the advanced age of ninety years.

any human memorials of genius, letters, and wisdom. Whether we regard the splendour with which the decisions illustrate their author, the success with which they have educed and fixed on an immoveable basis many of the most valuable principles of International Jurisprudence, or their commanding and salutary influence upon the great community of Christian nations,—they are unrivalled for profundity of erudition, conclusiveness of reasoning, and splendour of judicial eloquence."

Dr (now Sir John) Dodson, states, in the preface already referred to, that "the judgment of Dalrymple *v.* Dalrymple, as delivered by the very eminent person who presides in the Consistorial Court of London, contains a clear and masterly account of the nature and institution of marriage, and of the various modes by which the relation of man and wife may be constituted. These modes and regulations, as prescribed by the law of Scotland, furnish the more immediate subject of discussion, but it was necessary to take a wider range in order to give a a full and comprehensive view of the subject. From the investigation it appears, according to the judgment of that learned person, that the law of Scotland, in relation to the marriage compact, rests upon the basis of the ancient canon law, and has not deviated from the rule of that system on which it is founded, whereby a contract *per verba de præsenti*, or a promise *de futuro cum copula*, is considered as sufficient to constitute a legally valid marriage. To the people of Scotland this decision, it is presumed, will be found peculiarly interesting, being calculated to assist in the prevention of all future doubts upon a subject respecting which great difference of opinion has lately prevailed, and involving, as it does, the domestic security and happiness of many families. Nor can it be deemed wholly unimportant to the inhabitants of this part of the United Kingdom; although a very

different line of policy relative to the law of marriage has been *here* adopted, yet the question derives a degree of consequence from the intimate connection subsisting between the two countries, and the constant intercourse necessarily taking place between their respective inhabitants.

"It must be recollected, likewise, that the legal tribunals of England recognise the validity of every marriage contracted in conformity to the laws and usages of the country in which it had its origin.

"If the present publication shall tend to diffuse any correct information upon a subject which appears so important, and at the same time convey some idea of the judicial decision by which the doctrine is established, the wishes of the reporter will be satisfied, and his object completely attained."

The publisher proposes to give, in a future number of these Tracts, a specimen of Sir William Scott's judgments in the High Court of Admiralty, which he hopes will tend to draw the notice of Students of Law to the fuller record of the decisions of this eminent Judge, in the collections by Drs Robinson, Dodson, and Haggard; and if he shall succeed in doing so, he will, he is persuaded, confer a real benefit upon the young legal aspirant, inviting his attention to a series of great and able decisions, distinguished by profound learning and elegant scholarship, and which have raised as splendid and as consistent a system of jurisprudence in the Admiralty Court, as was erected in the province of equity by Lord Hardwick, or by Lord Mansfield in the sphere of the Common Law.

EDINBURGH, 38 GEORGE STREET,
2d May 1836.

JUDGMENT

PRONOUNCED IN THE CASE OF

DALRYMPLE *v.* DALRYMPLE.

THIS action was brought by the wife against the husband, to obtain restitution of conjugal rights. The chief point in discussion was, the validity of a *Scotch marriage, per verba de præsenti*, and without religious celebration: one of the parties being an English gentleman, not otherwise resident in Scotland, than as quartered with his regiment in that country.

JUDGMENT.

Sir William Scott.—The facts of this case, which I shall enter upon without preface, are these: Mr John William Henry Dalrymple is the son of a Scotch noble family. I find no direct evidence which fixes his birth in England, but he is proved to have

been brought up from very early years in this country. At the age of nineteen, being a cornet in his Majesty's Dragoon Guards, he went with his regiment to Scotland in the latter end of March or beginning of April 1804, and was quartered in and near Edinburgh during his residence in that country. Shortly after his arrival, he became acquainted with Miss Johanna Gordon, the daughter of a gentleman in a respectable condition of life. What her age was does not directly appear, she being described as of the age of twenty-one years *and upwards:* she was, however, young enough to excite a passion in his breast, and it appears that she made him a return of her affections. He visited frequently at her father's house in Edinburgh, and at his seat in the country, at a place called *Braid* A paper without date, marked No. 1,* is produced by her: it contains a mutual *promise* of marriage, and is superscribed, "a sacred promise." A second paper, No. 2,† produced by her, dated May 28. 1804, contains a mutual *declaration* and *acknowledgment* of a marriage. A third paper, No. 10,‡ produced by her, dated July 11. 1804, contains a *renewed declaration* of marriage made by him, and accompanied by a promise of acknowledging her the moment he has it in his power; and an engagement on her part, that nothing but the greatest necessity shall compel her to publish this marriage. These two latter papers were enclosed in an envelope, inscribed "*Sacred Promises and Engagements*," and all the three papers are admitted, or proved in the

* See Appendix. † Ibid. ‡ Ibid.

cause, to be of the handwriting of the parties whose writing they purport to be.

It appears that Mr Dalrymple had strong reasons for supposing that his father and family would disapprove of this connection, and to a degree that might seriously affect his fortunes; he, therefore, in his letters to Miss Gordon, repeatedly enjoined this obligation of the strictest secrecy; and she observed it, even to the extent of making no communication of their mutual engagements to her father's family, though the attachment, and the intercourse founded upon it, did not pass unobserved by one of her sisters, and also by the servants, who suspected that there were secret ties, and that they *were* either already, or soon *would be* married. He wrote many letters to her, which are exhibited in the cause, expressive of the warmest and most devoted passion, and of unalterable fidelity to his engagements, in almost all of them applying the terms of husband and wife to himself and her. It appears that they were in the habit of having clandestine nocturnal interviews, both at Edinburgh and Braid, to which frequent allusions are made in these letters. One of the most remarkable of these nocturnal interviews passed on the 6th of July at Edinburgh, where she was left alone with two or three servants, having declined to accompany her father and family (much to her father's dissatisfaction) to his country house at *Braid*. There is proof enough to establish the fact, in my opinion, that he remained with her the whole of that night. He continued to write letters of a passionate

and even conjugal import, and to pay nocturnal and clandestine visits during the whole of his stay in Scotland; but there was no cohabitation of a more visible kind, nor any habite and repute, as far as appears, but what existed in the surmises of the servants and of the sister. His stay in that country was shortened by his father, who came down, alarmed, as it should seem, by the report of what was going on, and removed him to England on or about the 21st of July.

The correspondence appears to have slackened, though the language continued equally ardent, if I judge only from the number exhibited of the letters written after his return; though it is possible, and indeed very probable, there may be many more which are not exhibited. No letters of Miss Gordon's, addressed to him, are produced; he has not produced them, and she has not called for their production. In England he continued till 1805, when he sailed for Malta: his last letter, written to her on the eve of his departure, reinforces his injunctions of secrecy; and conjures her to withhold all credit from reports that might reach her of any transfer of his affections to another: it likewise points out a channel for their future correspondence, through the instrumentality of Sir Rupert George, the first Commissioner of the Board of Transports. He continued abroad till May 1808, with the exception of a month or two in the autumn of 1806, when he returned for a purpose unconnected with this history, unknown to his father, and, as it appears, to this lady. It is upon this occa-

sion that the alteration of his affections first discloses itself, in conversations with a Mr Hawkins, a friend of his family, to whom he gives some account of the connection which he had formed with Miss Gordon in Scotland, complains of the consequences of it, in being tormented with letters from her, which he was resolved never to read in future; and, having reason to fear she would write others to his father, he requested Mr Hawkins to use all means of intercepting any letters which she might write either to the one or the other.

Mr Hawkins executed this commission by intercepting many letters so addressed; though, in consequence of her extreme importunity, he forwarded two or three, as he believes, of those addressed to Mr Dalrymple; and he at length wrote to her himself, about the end of 1806, or beginning of 1807, and strongly urged her to desist from troubling General Dalrymple with letters. This led to a correspondence between her and Mr Hawkins; and it was not till the death of Mr Dalrymple's father (which happened in the spring of the year 1807) that she then asserted her marriage rights, and furnished him with copies of those important papers, which she denominates, according to the style of the law of Scotland, her "Marriage Lines." She took no steps to enforce her rights by any process of law. Upon the unlooked-for return of Mr Dalrymple, in the latter end of May 1808, he immediately visited Mr Hawkins, who communicated what had passed by letter between himself and Miss Gordon; and suffered him, though

not without reluctance, to possess himself of two of her letters, which Mr Dalrymple has exhibited. Mr Hawkins, however, dismissed him with the most anxious advice to adhere to the connexion he had formed, and by no means to attempt to involve any other female in the misery that must attend any new matrimonial connection. Within a very few days afterwards, Mr Dalrymple marries Miss Laura Manners, in the most formal and regular manner. Miss Gordon, who had before heard some reports of no very definite nature, instantly, upon hearing authentic news of this event, takes measures for enforcing her rights; and, being informed that he is amenable only to this jurisdiction, she immediately applies for its aid, to enforce the performance of what she considers as a *marriage contract*.

The cause has proceeded regularly on both sides, and has been instructed with a large mass of evidence, much of it replete with legal erudition, for which the Court has to acknowledge great obligations to the gentlemen who have been examined in Scotland.* It has also been argued with great industry and ability by the counsel on both sides, and now stands for final judgment. Being entertained in an English Court, it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England, is, that the validity of Miss Gordon's

* It has been deemed proper that this information, with the evidence, should accompany the report of this case; it has therefore been printed in the Appendix of the *original* Report by Sir John Dodson. London, 1811.

marriage rights must be tried by reference to the law of the country, where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland.

I am not aware that the case so brought here is exposed to any serious disadvantage beyond that which it must unavoidably sustain in the inferior qualifications of the person who has to decide upon it, to the talents of the eminent men to whose judgment it would have been submitted in its more natural forum. The law-learning of Scotland has been copiously transmitted; the facts of the case are examinable on principles common to the law of both countries, and indeed to all systems of law. It is described as an advantage lost, that Miss Manners, the lady of the second marriage, is not here made a party to the suit; she might have been so in point of form, if she had chosen to intervene; in substance she *is*; for her marriage is distinctly pleaded and proved, and is as much therefore under the eye, and under the attention, and under the protection of the Court, as if she were formally a party to the question respecting the validity of this marriage, which is in effect to decide upon the validity of her own. For I take it to be a position beyond the reach of all argument and contradiction, that if the Scotch marriage be legally good, the second or English marriage must be legally bad. Another advantage intimated to be lost is this, that the native forum would have compelled the production of her letters to him, for the purpose of seeing

whether any thing in them favoured his interpretation of the transaction. Surely, according to any mode of proceeding, there can be no need of a compulsory process to extract them from the person in whose possession they must be, if they exist at all. If they contain such matter as would favour such an interpretation, he must be eager to produce them, for they would constitute his defence: not being produced, the necessary conclusion is, either that they do not exist, or that they contain nothing which he could use with any advantage for such a purpose. The considerations that apply to the indiscretions of youth, to the habits of a military profession, and to the ignorance of the law of Scotland, arising from a foreign birth and education, are common to both, and I might say, to all systems of law. They are circumstances which are not to be left entirely out of the consideration of the Court in weighing the evidence for the establishment of the facts, but have no powerful effect upon the legal nature of the transaction when established.

The law, which in both countries allows the minor to marry, attributes to him, in a way which cannot be legally averred against, upon the mere ground of youth and inexperience, a competent discretion to dispose of himself in marriage; he is arrived at years of discretion, *quoad hoc*, whatever he may be with respect to other transactions of life, and he cannot be heard to plead the indiscretion of minority. Still less can the habits of a particular profession exonerate a man from the general obligations of law. And, with

respect to any ignorance arising from foreign birth and education, it is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country, engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party, who has engaged under a proper knowledge and sense of the obligation which the law would impose upon him by virtue of that engagement. According to the judgment of all the learned gentlemen who have been examined, the law of Scotland binds Mr Dalrymple, though a minor, a soldier, and a foreigner, as effectually as it would do if he had been an adult, living in a civil capacity, and with an established domicil in that country.

The marriage, which is pleaded to be constituted, by virtue of some or all of the facts, of which I have just given the outline, and to which I shall have occasion more particularly to advert in the course of my judgment, has been in the argument described as a *clandestine* and *irregular* marriage. It is certainly a *private* transaction between the individuals, but it does not of course follow that it is to be considered as a *clandestine* transaction, in any ignominious meaning of the word; for it may be, that the law of the country, in which the transaction took place, may contemplate private marriages with as much countenance and favour as it does the most public. It de-

pends likewise entirely upon the law of the country, whether it is justly to be styled an *irregular* marriage. In some countries only one form of contracting marriage is acknowledged, as in our own, with the exception of particular indulgences to persons of certain religious persuasions: saving those exceptions, all marriages not celebrated according to the prescribed form, are mere nullities; there is and can be no such thing in this country as an irregular marriage. In some other countries, all modes of exchanging consent being equally legal, all marriages are on that account equally regular. In other countries, a form is recommended and sanctioned, but with a toleration and acknowledgment of other more private modes of effecting the same purpose, though under some discountenance of the law, on account of the non-conformity to the order that is established. What is the law of Scotland on this point?

Marriage being a contract, is of course *consensual* (as is much insisted on, I observe, by some of the learned advocates), for it is of the essence of all contracts to be constituted by the consent of parties. *Consensus non concubitus facit matrimonium*,* the

* D. lib. 50, tit. 17, l. 30, de Reg. Juris.—D. lib. 35, tit. 1, l. 15.—*Huber*, de Nuptiis, p. 23, lib. 24, tit. 2, de Divortiis.—*Voet.*, lib. 23, tit. 2, s. 2.—*Vinnius*, lib. 1, tit. 9, s. 1.—*Cujac.* in D. de Rit. Nup. v. 1, p. 800, in Cod. lib. 5, tit. 1, de Spons. et Arrhis.—*Taylor's* Civil Law, p. 301.—*Puffendorf.* b. 6, c. 1, s. 14.—*Wood's* Instit. book 1, chap. 1.—27, qu. 2, c. 1. Matrimonium.—27, qu. 2, c. 2, Sufficiat.—27, qu. 2, c. 5, Cum initistur.—27, qu. 2, c. 6, Conjuges.—C. 25, Extra de Spons. et Matrim.

maxim of the Roman civil law, is, in truth, the maxim of all law upon the subject; for the *concubitus* may take place for the mere gratification of present appetite, without a view to any thing further. But a marriage must be something more; it must be an agreement of the parties looking to the *consortium vitæ*:* an agreement, indeed, of parties capable of the *concubitus*, for though the *concubitus* itself will not constitute marriage, yet it is so far one of the essential duties for which the parties stipulate, that the incapacity of either party to satisfy that duty nullifies the contract.†—Marriage in its origin is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind: It is the parent, not the child, of civil society, "*Principium urbis et quasi seminarium Reipublicæ.*"‡—In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civilized countries, acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded. It then becomes a religious, as well as a natural, and civil contract; for it is a great mistake to suppose that, because it is the one, there-

—*Huber*, Eunom. Rom. ad lib. 23. Pand. Vind. s. 1.—*Hoppii*, commen. ad Ins. lib. 1, tit. 10.—*Wood's* Instit. book 1, chap. 2.—*Ayl.* Parerg. 862.

* D. lib. 23, tit. 2, l. 1.—Instit. lib. 1, tit. 9, s. 1.

† C. 2 et 3 Extra. de Spons. et Matrim.—*Vinnius*, lib. 1, tit. 9, s. 1.—*Burn's* Eccles. Law, v. 2, p. 590.—*Ayl.* Par. 226.

‡ *Cic.* de Off. l. 17.

fore it may not likewise be the other. Heaven itself is made a party to the contract, and the consent of the individuals, pledged to each other, is ratified and consecrated by a vow to God. It was natural enough that such a contract should, under the religious system which prevailed in Europe, fall under ecclesiastical notice and cognizance, with respect both to its theological and its legal constitution; though it is not unworthy of remark that, amidst the manifold ritual provisions made by the Divine Lawgiver of the Jews, for various offices and transactions of life, there is no ceremony prescribed for the celebration of marriage. In the Christian church, marriage was elevated in a later age to the dignity of a sacrament, in consequence of its divine institution, and of some expressions of high and mysterious import respecting it contained in the sacred writings. The law of the Church, the canon law (a system which, in spite of its absurd pretensions to a higher origin, is in many of its provisions deeply enough founded in the wisdom of man), although, in conformity to the prevailing theological opinion, it reverenced marriage as a sacrament, still so far respected its natural and civil origin, as to consider, that where the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest. It had even in that state the character of a sacrament;* for it is a misapprehension to suppose that

* *Sanchez*, lib. 2, disp. 6, s. 2; et lib. 2, disp. 10, s. 2.—Father *Paul*, p. 737.—*Pallavicini*, lib. 23, chap. 8.—*Pothier*, tit. 3, p. 290.—27, qu. 2, c. 10, omne.

this intervention was required as matter of necessity, even for that purpose, before the Council of Trent. It appears from the histories of that Council, as well as from many other authorities, that this was the state of the earlier law, till that Council passed its decree for the reformation of marriage. The consent of two parties* expressed in words of present mutual acceptance, constituted an actual and legal marriage, technically known by the name of *Sponsalia per verba de præsenti*, improperly enough, because *sponsalia*, in the original and classical meaning of the word, are preliminary ceremonials of marriage, and therefore, Brower justly observes, *jus pontificium nimis laxo significatu, imo etymologiâ invitâ, ipsas nuptias sponsalia appellavit.*† The expression, however, was constantly used in succeeding times to signify *clandestine* marriages, that is, marriages unattended by the prescribed ecclesiastical solemnities, in opposition, first, to regular marriages; secondly, to mere engagements for a *future marriage*, which were termed *sponsalia per verba de futuro*, a distinction of *sponsalia* not at all known to the Roman civil law.‡ Different rules, relative to their respective effects in point of legal consequence, applied to these three cases,—of regular marriages,—of irregular marriages,—and of mere promises or engagements. In the regular marriage every thing was presumed to be complete and consummated

* C. 25. et C. 31. Extra de Spons. et Matrim.—C. 3. Extra. de Sponsa Duorum.—*Swinburn*, sect. 4. s. 2, 3, 4. et sect. 18. s. 1.—*Brower*, lib. 1. cap. 2. s. 8, 9. et cap. 22. s. 12. et cap. 27. s. 21.

† L. 1. c. 1. n. 6.

‡ *Swinburn.* Sect. 3. § 3.

both in substance and in ceremony. In the irregular marriage every thing was presumed to be complete and consummated in substance but not in ceremony; and the* ceremony was enjoined to be undergone as a matter of order. In the promise or *sponsalia de futuro*, nothing was presumed to be complete or consummate either in substance or ceremony. Mutual† consent would release the parties from their engagement; and one party, without the consent of the other, might contract a valid marriage, regularly or irregularly, with another person; but if the parties who had exchanged the promise had carnal‡ intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection. I spare myself the trouble of citing from the text-books of the Canon Law, the passages that support these assertions. Several of them have been cited in the course of this discussion, and they all lie open to obvious reference in Brower and Swinburn, and other books that profess to treat upon these subjects. The reason of these rules is manifest enough. In proceedings under the Canon Law, though it is usual to plead consummation, it is not necessary to prove it, because it is always to be

* *Swinburn*, Sect. 17. § 1.

† C. 2. Extra. de Spons. et Matrim.

‡ C. 30. et 31. Extra. de Spons. et Matrim.—C. 3. Extra. de Sponsa duorum.—*Brower*, lib. 1. cap. 22.—*Swinburn*, Sect. 17. s. 11.

presumed in parties not shewn to be disabled by original infirmity of body. In the case of a marriage *per verba de præsenti*, the parties there also deliberately accepted the relation of husband and wife, and consummation was presumed as naturally following the acceptance of that relation, unless controverted in like manner. But a promise *per verba de futuro* looked to a future time; the marriage which it contemplated might perhaps never take place. It was* defeasible in various ways; and, therefore, consummation was not to be presumed; it must either have been proved or admitted. Till that was done, the relation of husband and wife was not contracted: it must be a † promise *cum copula* that implied a present acceptance, and created a valid contract founded upon it.

Such was the state of the Canon Law, the known basis of the matrimonial law of Europe. At the Reformation, this country disclaimed, amongst other opinions of the Romish Church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin; and on that account, as well as of the religious forms that were prescribed for its regular celebration, an *holy* estate, *holy matrimony*, but it likewise retained those rules of the Canon Law which had their foundation not in the sacrament, or in any religious view of the subject, but in the natural and civil contract of marriage. The Ecclesiastical Courts, therefore, which

* *Swinburn*, sect. 18. p. 1. et Sect. 4. p. 2.

† *Swinburn*, sect. 17. p. 11.

had the cognizance of matrimonial causes, enforced these rules, and amongst others, that rule which held an irregular marriage, constituted *per verba de præsenti, not followed by any consummation shewn*, valid to the full extent of voiding a subsequent regular marriage contracted with another person.* A statute† passed in the reign of Henry VIII. proves the fact by reciting, that " Many persons after long continuance in matrimony, without any allegation of either of the parties, or any other at their marriage, why the same matrimony should not be good, just, and lawful, and after the same matrimony solemnized, and *consummate by carnal knowledge*, have by an unjust law of the Bishop of Rome, upon pretence of a former contract made, and *not consummate by carnal copulation*, been divorced and separate;" and then enacts, " that marriages solemnized in the face of the Church, and consummate with bodily knowledge, shall be deemed good, notwithstanding any pre-contract of matrimony, *not consummate with bodily knowledge*, which either or both the parties shall have made." But this statute was afterwards repealed, as having produced *horrible mischiefs*, which are enumerated in very declamatory language, in the preamble of the statute 2 Edward VI.; and Swinburn, speaking the prevailing opinion of his time, applauds the repeal, as *worthily and in good reason enacted.* The same doctrine is recognised, by the temporal Courts, as the existing rule of the matrimonial law of this country, in Bunting's case, 4 Coke, 29.—" John Bunting,

* *Brower*, 1. 22. 12. † 32 Hen. VIII. cap. 38. sec. 2.

father of the plaintiff, and Agnes Adenshall, contracted marriage *per verba de præsenti*, and afterwards, on the 10th of Dec. 1555, the said Agnes took to husband Thomas Twede; and afterwards, on the 9th of July, Bunting libelled against her in the Court of Audience, *et decret. fuit quod prædict. Agnes subiret matrimonium cum præfato Bunting, et insuper pronunciatum fuit dictum matrimonium fore nullum.*" Though the common law certainly had scruples in applying the civil* rights of dower, and community of goods, and legitimacy, in the cases of these looser species of marriage. In the later case of Collins and Jesson, 3 Anne, it was said by Holt, Chief Justice, and agreed to by the whole Bench, that "if a contract be *per verba de præsenti*, it amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God, as if it had been *in facie ecclesiæ*." "But a contract *per verba de futuro*, which do not intimate an actual marriage, but refer to a future act, is releasable." 2 Salk. 437. Mod. 155. In Wigmore's case, 2 Salk. 438, the same judge said, "a contract *per verba de præsenti* is a marriage; so is a contract *de futuro*; if the contract be executed, and he take her, 'tis a marriage, and they cannot punish for fornication." In the Ecclesiastical Court the stream ran uniformly in that course. One of the most remarkable is that furnished by the dili-

* *Swinburn*, sect. 1. s. 2. and sect. 17. s. 29.—Tract. de Repub. *Ang.* p. 103.—*Perkins*, tit. Feoffments, fol. 40. p. 38. Ed. 3. 12.—1 Roll. Abridg. 341. and 357.—*Moor*, 169.

gence of Dr Swabey, on account of its striking resemblance to the present case: I mean the case of Lord Fitzmaurice, son of the Earl of Kerry, *coram Deleg.* in 1732. There were in that case, as in the present, three engagements in writing: The first was dated June 23, 1724, and contained these words, "We swear we will marry one another." The second, dated July 11. 1724, was to this effect: "I take you for my wife, and swear never to marry any other woman." This last contract was repeated in December of the same year. It was argued there, as here, that the iteration of the declaration proved that the parties did not depend upon their first declaration, and was in effect a disclaimer of it. But the Court, composed of a full Commission, paid no regard to the objection, and found for the marriage, and an application for a commission of review, founded upon new matter alleged, was refused by the Chancellor. Things continued upon this footing till the Marriage Act, 26 G. 2. c. 33. described by Mr Justice Blackstone * "an innovation on our laws and constitution," swept away the whole subject of irregular marriages, together with all the learning belonging to it, by establishing the necessity of resorting to a public and regular form, without which the relation of husband and wife could not be contracted.

It is not for me to attempt to trace the descent of the matrimonial law of Scotland since the time of the Reformation. The thing is in itself highly probable, and we have the authority of Craig † for asserting that

* Book 1. chap. 15. s. 3. † *Craig*, lib. 2. dieg. 18. s. 17.

the Canon Law is its basis there, as it is every where else in Europe, "*totam hanc quæstionem pendere a jure pontificio*," though it is likely enough that in Craig's time, who wrote not long after the Reformation, the consistorial law might be very *unsettled*, as Mr Cay in his deposition describes it to have been. It is, however, admitted by that learned gentleman, that it settled upon its former foundations, for he expressly says, that *the Canon Law in these matters is a part of the law of the land; that the Courts and lawyers reverence the decretals, and other books of the more ancient Canon Law*; and I observe that in the depositions of most of the learned witnesses, and indeed in all the *factums* that I have seen upon these subjects, they are referred to as authorities. Several regulations, both ecclesiastical and civil canons and statutes, have prescribed modes of celebrating marriage. Mr Cathcart, in particular, refers to them in his deposition. Some of these appear to have been made in times of great ferment, during the conflict between the Episcopal and Presbyterian parties, and are therefore, I presume, of transitory and questionable authority. Mr Cathcart infers that the whole of the Scotch statutes hold solemnization by a clergyman, or, as he expresses it, some one assuming the functions of a clergyman, as *necessary*. It rather appears difficult to understand this consistently with the fact, that other marriages have *always* been held legal and valid. What the form of solemnization by a clergyman is, I have not been accurately informed; prescribed ritual forms are not, I believe, admitted by

the church of Scotland for any office whatever. Whether the clergyman merely receives the declaration as a witness, or pronounces the parties, by virtue of his spiritual authority, to be man and wife, as in our form, does not distinctly appear. I observe that Mr Gillies says in his deposition, "that to make marriage valid, it is not necessary that it should be celebrated *in facie ecclesiæ*, but *rebus integris* it can only be constituted by a consent adhibited in the presence of a clergyman, or *in some mode equivalent to an actual celebration.*" So Lord Braxfield in a loose note, which is introduced, is made to say, "Private consent is not the consent the law looks to; it must be before a priest, or *something equivalent.*" Now what are these equivalents? and how to be provided? Are they to be carved out by the private fancy and judgment of the individuals? If so, though equivalent, they can hardly be deemed the regular forms, and yet appear to stand on a footing of equal authority. I observe, likewise, that a marriage before a magistrate is alluded to in some passages, as nearly equal to that before a minister, though certainly not a marriage *in facie ecclesiæ*, in any proper sense of that expression.

Sir Ilay Campbell states, in an opinion of his given to the English Chancery * in a case furnished to me by Dr Stoddart, "that marriages, irregularly performed without the intervention of a clergyman, are censurable, and formerly the parties were liable to be fined or rebuked in the face of the church, *but this for a long time has not been practised.*" The regulations,

* Lib. Reg. A. 1780. f. 552.

therefore, whatever they may be, are not penally enforced; and it does not appear, that they are enforced by any sense of reputation or of obligation imposed by general practice. The advocates, who describe the modes of marriage by the terms *regular* and *irregular*, seem, as far as I can collect, to attribute no very distinctive preference to the one over the other; at any rate, the distinction between them is not very strongly marked in the existing usage of that country. Many of the marriages, which take place between persons in higher classes of society, are contracted in such *irregular* forms, if so to be denominated. They appear to create no scandal; to give no offence. The parties are not reprobated by public opinion, nor is legal censure actually applied. But taking it, that the distinction between the *regular* and *irregular* marriages was much stronger than I am enabled, by the present evidence, to suppose, the question still remains to be examined, how far actual consummation is required, by the law of Scotland, in marriages which are so to be deemed *irregular*.

The libel is drawn in a form not calculated to extract, simply and directly, a distinct statement of what the law of Scotland may be upon this point; for it collects together all the points of which the party conceives she can avail herself, consummation included, as matters of fact and matters of law, and then alleges, that, by the law of Scotland, this aggregate constitutes a marriage; without providing for a possible case in which she might establish some of these matters and fail in establishing others, *e. g.* if she failed in proof

of a *copula*, but succeeded in establishing a solemn compact. If the law had been more distinctly understood here at the commencement of this suit, the libel would probably have been drawn with more accommodation to the possible state of facts that might ultimately call for the proper specific rule of law. The advocates of Scotland have, to a great degree, supplied the want of that distinctness in the libel, by bringing forward the distinctions in their answers, and applying what they conceive to be the law, applicable to the possible case that may result from the evidence: most of them have stated what they conceive to be the law, first, in the case of a promise *de futuro*; secondly, of a promise *cum copula*; thirdly, of a solemn declaration or acknowledgment of marriage; and fourthly, of such a declaration accompanied by a *copula*. It may be convenient to consider, first, whether the present case is a case of promise, or of present declaration and acknowledgment. It will be convenient to do so in two respects: The first convenience attending it is, that the fact itself is determinable enough upon the face of written existing instruments. It is not to be gathered from the loose recollections of loose verbal declarations, not guarded either in the expressions of those who made them, or in the memory of those who attest them. The second convenience resulting from this is, that a large portion of the inquiry into the other points of the case may, in a great degree, be rendered superfluous; for if these papers contain mere promises, then have I to consider only the law of promises, as referable to

cases accompanied or unaccompanied by a *copula*, leaving out entirely the law that respects acknowledgment and declaration. On the other hand, if they are to be considered as acknowledgments, then the law of promises may be dismissed, except perhaps sometimes to be introduced incidentally for purposes of occasional illustration.

Whether they are to be considered as promises or declarations must be determined upon the contents of the instruments themselves, on such a view as the plain meaning of the words imports, and upon the information of their technical meaning as communicated by the Scotch lawyers; for it is possible that they may be subject to a technical construction different from their obvious meaning. This is the case in the marriage settlements of Scotland. The words of the *stipulatio sponsalitia* are present declaratory words; the parties mutually accept each other, but the engagements they enter into are always technically considered to be mere promises *de futuro*. Those who are conversant in the books of the Canon Law, will recollect the extremely nice distinctions which that law and its commentators have made between expressions of a very similar import in their obvious meaning, as constituting contracts *de præsenti*, or only promises *de futuro*.

The first paper is without date, and is merely a *promise*. Mr Dalrymple promises to marry Miss Gordon *as soon as it is in his power*, and she promises the same; it is subscribed by both their names, —is endorsed "A sacreed promise," and is left in her

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possession. It is pleaded to be the first that was executed by them, and it is highly reasonable to presume that it was so, for no person, I think, would be content to accept such a paper as this, after having received the papers which follow, marked 2 and 10. The paper marked No. 2, is dated on the 28th of May 1804, and contains these words, "I hereby *declare* Johanna Gordon is my lawful wife; and I hereby *acknowledge* John William Henry Dalrymple as my lawful husband." I see no great difference between the expression *declare* and *acknowledge;* the words properly enough belong to the parties by whom they are respectively used, and are perhaps not improperly adapted to the decorums of such a transaction between the sexes. No. 10 is a reiterated declaration on the part of Mr Dalrymple, accompanied with a promise "that he will acknowledge Miss Gordon as his lawful wife the moment he has it in his power." She makes no repeated declaration, but promises that "nothing but the greatest necessity (necessity which —— situation alone can justify) shall ever force her to declare this marriage." It is signed by him, and by her, describing herself J. Gordon *now* J. Dalrymple, and it is dated July 11. 1804. Both the papers are inclosed in an envelope, on which is inscribed "Sacreed promises and engagements:" There are promises and engagements that would satisfy these terms, independent of the words which contain the declaration of the marriage. At the same time it is to be observed, that the words "promises and engagements" are not improperly applied to the marriage vow itself;

which is prospective in its duties, which engages for the performance of future offices between the parties till death shall part them, and to which, in the words of our liturgy, *it plights their troth*, or in more modern language, pledges their good faith for that future performance. I feel some hesitation in acceding to the remark that the paper marked No. 2 is at all weakened or thrown loose by the mere engagement of secrecy, which seems to be the principal, if not the sole, object of the latter paper. Though Mr Dalrymple has thrown in a renewed declaration of his marriage, that reiterated declaration, though accompanied with a promise of secrecy, cannot, upon any view of the case, be considered as a disclaimer of the former. An engagement of secrecy is perfectly consistent with the most valid, and even with the most regular marriages. It frequently exists even in them from prudential reasons; from the same motives it almost always does in private or clandestine marriages. It is only an evidence against the existence of a marriage, when no such prudential reasons can be assigned for it, and where every thing, arising from the very nature of marriage, calls for its publication.

Such is the nature of these exhibits; first, a promise; secondly, that promise merged in the direct acknowledgment of the accomplished fact; thirdly, a renewed admission of the fact on his side, with a mutual engagement for secrecy, till the proper time for disclosure should arrive.

In these papers, as set up by Miss Gordon, resides the *constitution*, as some of the gentlemen, who have

been examined, call it, or as others of them term it the *evidences* of the marriage; for it is matter of dispute between these learned persons, whether such papers, when free from all possible impeachment, are *constituents*, or merely *evidences* of marriage. It appears to be a distinction not very material in its effects; because if it is to be considered that such papers, so qualified, are only to be treated as *evidences*, yet if free from all possible impeachments, on the grounds on which the law allows them, as evidences to be impeached, they make full faith of the marriage; they sustain it as effectually, as if, according to other ideas, they directly constituted it; they have then become *præsumptiones juris et de jure*, which establish the same conclusion, although in another way.

But these papers must be taken in conjunction with the letters, which may control or confirm them.—What is the effect of the letters? In almost all of them Mr Dalrymple addresses Miss Gordon as his wife, and describes himself as her husband. In the first letter he insists upon it, that she shall draw upon him for any money she may stand in need of, "for it is her right," and "in accepting of it she will prove her acknowledgment of it." Her sister he calls his sister. This letter appears by the post-mark to have been written before No. 2, and therefore has been said to be entirely premature, and to give an interpretation to subsequent expressions of the like kind.—But, *non constat* that it might not be written long after the undated promise by which the parties entered into a solemn engagement to marry. Verbal

declarations, similar in their imports to the contents of No. 2, might have passed, for it can hardly be conceived that such a paper could have passed, without many preliminary verbal declarations to the same effect. People do not write in that manner, till after they have talked together in the same style.—The post-mark on the letter, No. 4, is May the 30th, and this letter refers to what passed on the night after the paper, No. 2, bears date; in it, he says, "You are my wife; to retract is impossible and ever shall be; I have proved my legal right to protect you, which I have most fully established: nothing in this world shall break those ties." The letter, No. 5, has these expressions: "Remember you are mine: that God Almighty may preserve my wife is the prayer of her husband." No. 6, "It grieves me to suffer you five minutes from your husband; nothing can change my sentiments, independent even of those sacred ties which unite us.—Nothing ever can or should (if 'twere possible) annul them.—Put that confidence in me which your duty requires.—That God may ever preserve my wife, and inspire her with the purest love for her husband, is the first wish of her adoring ————." No. 8. "I have received letters from town which say that Lord Stair has heard of our marriage." No. 12. "Whatever money you may want draw on me for without scruple." No. 13, dated May 29. 1805. "Situated as you are, nothing could strengthen the ties which unite us; therefore wish it not to be mentioned that you are my wife till it can be done without injury to ourselves.

I insist upon a paper acknowledging yourself as my wife." No. 14. dated June 10. 1805. "Forward to me the paper I requested in my last, and acknowledge yourself my wife—that as we are not immortal I may leave you, in trust of a friend, the small remains of what was once a tolerable fortune; you can't refuse on any legal grounds; do, my dearest wife, forward it." In No. 15, dated June 28, 1805, he says, "I would not give up the title of your sister's brother for any consideration. Don't deny yourself what you require, as I should not wish my wife to appear in any thing not consistent with her rank; I will arrange before my departure money-matters, so as to give you every opportunity of gratifying your taste, or any other fancy." In the letter marked 14, he asks her permission to go abroad on account of the distress of his affairs. "Will you allow me to endeavour by a short absence to rectify these things? In asking your consent, I humbly conjure you, dearest love, to pardon me. I solemnly assure you I will not be absent from you very long." In another part of this letter he points out the period of four months as the probable duration of his absence.

Now it is impossible to say that the exhibits, No. 2 and 10, are at all weakened by the strong conjugal expressions contained in these letters. Taken together they, in their plain and obvious meaning, import a recognition of an existing marriage. What is their technical meaning? That information we must obtain from the learned persons who have been examined —Mr Erskine, Mr Hamilton, Mr Craigie, Mr

Hume, and Mr Ramsay, are all clearly of opinion that they are "*present declarations.*"—Mr Cay is equally clear that they "are contracts *de præsenti.*"—Sir Ilay Campbell describes them as "*very explicit mutual declarations of marriage* between the parties." Mr Clerk says that No. 2 is evidence of a very high nature to prove that "a marriage *had been* contracted by the parties; it is *a full and explicit declaration* of a contract *de præsenti.*" "No. 10," he says, "imports little more than No. 2; it is *important evidence* to the *same effect.*" Mr Cathcart and Mr Gillies who hold a *copula* in all cases necessary, do not distinctly say under which class of cases the present falls.

Upon this view I think myself entitled to lay aside, at least for the present, the rules of law that apply to promises. The main enquiry will thus be limited to two questions, Whether, by the law of *Scotland*, a present declaration *constitutes* or *evidences* a marriage *without a copula;* and, secondly, Whether, if it does not, the present evidence supplies sufficient proof that such a requisite has been complied with.

The determination of the first question must be taken from the authorities of that country, deciding for myself and for the parties entrusted to my care, as well as I can, upon their preponderance where they disagree, and feeling that hesitation of judgment which ought to accompany any opinion of mine upon points which divide the opinions of persons so much better instructed in all the learning which applies to them.

The authorities to which I shall have occasion to

refer are of three classes; first, the opinions of learned professors given in the present or similar cases; secondly, the opinions of eminent writers as delivered in books of great legal credit and weight; and, thirdly, the certified adjudication of the tribunals of Scotland upon these subjects. I need not say that the last class stands highest in point of authority; where private opinions, whether in books or writing, incline on one side, and public decisions on the other, it will be the undoubted duty of the Court, which has to weigh them, *stare decisis.*

Before I enter upon this examination I will premise an observation, from which I deduce a rule that ought, in some degree, to conduct my judgment; the observation I mean is this, That the Canon Law, as I before have described it to be, is the basis of the marriage law of Scotland, as it is of the marriage law of all Europe. And whether that law remains entire, or has been varied, I take it to be a safe conclusion, that in all instances where it is not proved that the law of Scotland has resiled from it, the fair presumption is, that it continues the same. Shew the variation, and the Court must follow it; but if none is shewn, then must the Court lean upon the doctrine of the ancient general law; for I do not find that Scotland set out upon any original plan of deserting the ancient matrimonial law of Europe, and of forming an entire new code upon principles hitherto unknown in the Christian world. It becomes of importance, therefore, to consider what is the ancient general law upon this subject; and on this point it is

not necessary for me to restate, that, by the ancient general law of Europe, a contract *per verba de præsenti*, or a promise *per verba de futuro cum copulâ*, constituted a valid marriage without the intervention of a priest, till the time of the Council of Trent, the decrees of which Council were never received as of authority in Scotland.

It appears from the case of Younger, cited by Sir Thomas Craig,* that, in his time, the practice upon a contract *de præsenti*, was the same in Scotland as it continued to be in England till the period of the Marriage Act, viz. to compel the reluctant party to a public celebration as matter of order. This was soon discontinued in Scotland, on account of the apparent incongruity of compelling a man to marry against his will, but with a solemn profession of love and affection to the party who compelled him. But though they discarded the process of compulsion for some such reason as this, which is stated by Mr Hume, they might still consistently retain the principle, that a present consent constituted a valid marriage. Whether it was retained, is the question I have to examine, assuming first (as I have done) that if the contrary is not shewn, it must so be presumed.

The evidence of opinions on this point, taken in this and similar cases, and under similar authority, stands thus:—Mr Erskine, Mr Craigie, Mr Hamilton, Mr Hume, and Mr Ramsay, who have been examined upon the question at present before the Court, are all clear and decided in their opinions, that a declaration

* Lib. 2. dieg. 18. s. 19.

per verba de præsenti without a *copula* does, by the law of Scotland, constitute a valid marriage. I will not enter into an examination of their authorities where they agree.—*Oportet discentem credere*, though, where authorities differ, it is a rule which cannot be universally applied. Still less shall I presume to discuss their reasonings, except in a few instances, where, however desirous to follow, I find a real inability to accompany them to their conclusions. To the authorities above stated, I must add the opinions of the learned persons examined upon the case of Beamish and Beamish; a case which came before this Court upon a similar question of a Scotch marriage of an English man with a Scotch woman in the year 1788, and in which the Court of Arches, to which it was appealed, upon the informations of law obtained from the learned advocates of Scotland, pronounced for the validity of the marriage. Mr John Millar, Professor of Law at Glasgow, there said, "that, by the law of Scotland, the ceremony of being married by a clergyman was not necessary to constitute a valid marriage. The deliberate consent of parties, entering into an agreement to take one another for husband and wife, was sufficient to constitute a legal marriage, as valid in every respect as that which is celebrated in the presence of a clergyman.—Consent must be expressed or understood to be given *per verba de præsenti*; for consent *de futuro*, that is, a promise of marriage, does not constitute actual marriage. By the Scotch law, the deliberate consent of parties constitutes marriage."—Mr John Orr, in

his deposition, said: "By the laws of Scotland, a solemn acknowledgment of a marriage having happened between the parties, whether verbally or in writing, is sufficient to constitute a marriage, whether expressed *in verbis de præsenti*, or in an acknowledgment that the marriage took place at a former period. A promise followed by a *copula* would constitute a valid marriage; and a written instrument, containing not a consent *de præsenti*, but only stating that the parties were married at a certain time, or even a solemn verbal acknowledgment to this effect, although no actual marriage had taken place, is sufficient to constitute a marriage by the law of Scotland."—Mr Hume said: "Marriage is constituted by consent of parties to take or stand to each other in the relation of husband and wife.—The mode or form of consent is not material, but it must be *de præsenti*." Mr Erskine and Mr Robertson agreed in saying, "that a deliberate acknowledgment of the parties that they were married, though not containing a contract *per verba de præsenti*, is sufficient evidence of a marriage, without the necessity of proving the actual celebration." Mr Clerk, Mr Gillies, and Mr Cathcart, who are examined in the present case on the part of Mr Dalrymple, are equally clear in their opinions on the other side of the question. Mr Cay inclines to think a *copula* necessary, "although well aware that a different opinion prevails among lawyers on this point."

Sir Ilay Campbell's opinion upon this important point, which the Court was particularly eager to learn, is, through some inaccuracy of the examiner,

transmitted in such a manner as to leave it rather a matter of question which of the two opinions he favours; for in the former part of the deposition he is made to say, that "by the general principles of the law of Scotland, marriage is *perfected* by the mutual consent of parties accepting each other as husband and wife." In words so express and unqualified, pointing to nothing beyond the mutual acceptance of the parties, as *perfecting* a marriage without reference to any future act as necessary to be done, I thought I had received a judgment of high authority in favour of the ancient rule, that consent without a *concubitus* constitutes a marriage: but in a latter part of the deposition, he lays it down, that this acknowledgment *per verba de præsenti* must be attended with personal intercourse, prior or subsequent; if so, it throws a doubt upon the precise meaning of the former position, which had declared a marriage perfected by mere mutual acceptance. "Without such intercourse," Sir Ilay Campbell says, "they would resolve into mere *stipulatio sponsalitia*, where the words are *de præsenti*, but the effect future."—And here I have to lament the difficulty I find in following so highly respectable a guide to the conclusion, on account of a distinction that strongly impresses itself upon my apprehension. In the *stipulatio sponsalitia*, the words *de præsenti* are qualified by the future words that follow, and which imply something more is to be done—a public marriage to take place; but in the case supposed of a clear present declaration, no such qualifying expressions occur—nothing pointing to

future acts as the fulfilment of a present engagement. I find the greater difficulty in ascertaining the decided judgment of this very eminent person, from considering an opinion of his given into the English Court of Chancery,* upon a requisition from that Court, and on which that Court acted in the case of the Scotch marriage. In that case, the case of the marriage of Thomas Thomasson and Catharine Grierson, the opinion dated August 18. 1781, and remaining on record in Chancery, states a present contract to be sufficient to validate a marriage, without any mention of a *copula*, antecedent, or subsequent; the known accuracy of his judgment would never have allowed him to omit this, if it had been considered by him at that time a necessary ingredient in the validity.—I might, perhaps, without much impropriety, be permitted to add another legal opinion of equal authority —the opinion of a person, whose death is justly lamented as one of the greatest misfortunes that have recently visited that country. I need not mention the name of the Lord President Blair, upon whose deliberate advice and judgment this present suit has been asserted in argument, and without contradiction, to have been brought into this Court.

Upon this state of opinions, what is the duty of the Court? How am I to decide between conflicting authorities? For to decide I am bound. Far removed from me be the presumption of weighing their comparative credit; it is not for me to construct a scale of personal weight amongst living authorities,

* Lit. Reg. A. 1780, F. 552.

with most of whom I am acquainted no otherwise than by the degree of eminence which situation, and office, and public practice, and reputation, may have conferred upon them. In such a case, I am under the necessity of quitting the proper legal rule of estimating *pondere, non numero*; I am compelled to attend a little to the numerical majority (though I admit this to be a sort of *rusticum judicium*), and finding that much the greater number of learned persons recognise a rule consonant to that which, in ancient times, governed the subject universally, I think I am not qualified to say, that, as far as the weight of opinion goes, it is proved that the law of Scotland has innovated upon the ancient general rule of the marriage law of Europe. It appears to me, that the common mode of expression used in Scotland, which is constantly recurring, is no insignificant proof of the contrary doctrine. It is always expressed—Promise *cum copulâ*; the *copula* is, in the ordinary phrase, a constant adjunct to the promise—never to the *contract de præsenti*; strongly marking the known distinction between the two cases, that the latter by itself worked its own effect, and that the other would be of no avail, unless accompanied with its constant and express associate.

I come now to the text authorities of the Scotch writers: the first to whom I shall refer is * Craig. It does not appear to me that he is of great authority either one way or the other: he admits generally that the question of marriage is not *hujus instituti propria*,

* *Craigii* jus feudale, lib. 2, dieg. 18, § 17 and 19.

sed judicis ecclesiastici, and the case of Younger, which he cites from the Court of the Commissaries, is a case not of a declaration *de præsenti*,, but of a promise *cum copulâ*; unless, therefore, it is previously established, that a promise *cum copulâ* converts itself in all respects, and in all its bearings, into a contract *de præsenti* without a *copula* (which certainly it does in the Canon Law, and is so recognised in the majority of the opinions upon the law of Scotland), it is no direct authority; and the conclusion is still more weakened, by observing that, in that case, a judicial sentence of the Commissaries had been actually obtained, and that the point determined by the common law was a mere question of succession upon legitimation, which may depend upon many considerations extrinsic to the original validity of the marriage.

A more pertinent authority, and of higher consideration, is Lord Stair, an ancestor, I presume, of one of the present parties—a person whose learned labours have at all times engaged the reverence of Scotch jurisprudence. He treats of this very question, stating it as a *question*, and determines it thus:* "It is not every consent to the married state that makes matrimony, but consent *de præsenti*, not a promise *de futuro matrimonio*." The marriage consists not in "the promise, but in the present consent, whereby they accept each other as husband and wife, whether by words expressly, or tacitly by marital cohabitation, or acknowledgment, or by natural commixion where there hath been a promise preceding,

* *Stair's* Institut. lib. 1, tit. 4, § 6.

for therein is presumed a conjugal consent *de præsenti*, but the consent must specially relate to that conjunction of bodies as being then in the consenter's capacity, otherwise it is void." I shall decline entering into the distinctions and refinements which have attempted to convert the obviously plain meaning of this passage into one of a very different import. It does appear to me to establish the opinion of this very learned person to be, that without a commixion of bodies immediately following (though in all cases to be looked to as possible, and at some time or other to take place), a present valid marriage is constituted by a contract *de præsenti*.

Sir George Mackensie,* Lord Advocate under King Charles and James the Second, whose authority carries with it a fair proportion of weight, says, "Consent *de præsenti* is that in which marriage doth consist. Consent *de futuro* is a promise; this is not marriage, for either party may resile *rebus integris*:" manifestly intimating that this could not be done under the consent *de præsenti*.

Another authority of more modern date, but entitled to the greatest respect, is Mr Erskine, a writer of institutional law; by him it is expressly laid down† that "marriage consists in the present consent, whether that be by words expressly or tacitly, by marital cohabitation, or by acknowledgment. Marriage may without doubt be *perfected* by the consent of parties declared by writing, provided the writing be so con-

* Mackensie, Institut. book i. tit. 6. § 3.

† B. i. tit. 6. § 5.

ceived as to import a present consent." Nothing upon the direct meaning of these words can be more clear than that he held bodily conjunction not necessary in a present contract. The very note of the anonymous editor, to whom, as an anonymous editor, no authority can be allowed, whatever may be the weight that really belongs to it, admits this; for he says, "From the later decisions of the Court, there is reason to doubt, if it can *now* be held as law, that the private declarations of parties, even in writing, are *per se* equivalent to actual celebration of marriage;" admitting, by that mode of expression, that such was the doctrine of the text and of the times when it was composed. Mr Clerk says, "*he considers the doctrine to be incorrect*," thereby likewise admitting it to be the doctrine contained in these words.

I am not enabled to say how far Mr Hutcheson's book can be considered as a work of authority. It, however, carries with it most respectable credentials, if it be true what has been asserted in the argument that it has been sanctioned by the approbation of several of the judges of Scotland, and particularly of Sir Ilay Campbell, who refers to it in his deposition as a book of credit, and under whose patronage it is published, and to whose perusal it is said to have been submitted previously to its publication. His statement of the law of Scotland is full and explicit in favour of the doctrine, that private mutual declarations require no bodily consummation to constitute a marriage. He says that the ancient principle to this

effect has been *happily* retained in the law of Scotland, speaking with similar feelings of attachment to it, which are observable in our Swinburn when he talks of the Repealing Statute of Edward VI. as *being worthily and for good reasons enacted*, though a regard to domestic security has induced us to extinguish it entirely in this part of the island by the legislative provisions of later times. Mr Hutcheson mentions it as a fact, that in the case of M'Adam against Walker, *none of the judges who dissented from the judgment, disputed that doctrine of the law.* His testimony to such a fact is equivalent to that of any person of unimpeached credit—even to that of Lord Stair or Mr Erskine; he has asserted it in the face of his profession and the public, and at the hazard of being contradicted if he has stated it untruly, by the united voice of the whole bench and bar of his country.

In support of the opposite opinion, no ancient writer of authority has been cited. The only writer named is of very modern date, Lord Kaimes, a man of an ingenious and inquisitive turn of mind, and of elegant attainments, but whose disposition, as he admits, did not lead him to err on the side of excessive deference to authority and establishment. The very title of his book is sufficient to excite caution; "*Elucidations respecting the law of Scotland*" may seem to imply rather proposed improvements than expositions of the existing law. He says, in his preface, that "he brings into the work the sceptical spirit, wishing and hoping to excite it in others, and confesses that he had perhaps indulged it too much."

But, supposing that it is liable to no objection of this kind, the whole of his chapter on these subjects, so far as this question is concerned, relates entirely to the effect of a promise *de futuro cum copulâ*, which has no application to the present case, unless it is assumed that this amounts to the same thing identically in law, to all intents and purposes, as a contract *de præsenti*. I must add, that his extreme inaccuracy in what he ventures to state with respect both to the ancient Canon Law and to the modern English law, tends not a little to shake the credit of his representations of all law whatever. In this chapter * he asserts that, by the *present* law of England, a mutual promise of marriage, *de futuro*, is a good foundation to compel a refractory party to complete the marriage, by process in the Spiritual Court. I mean no disrespect to the memory of that ingenious person when I say, that it is an extraordinary fact that it should have been a secret to any man of legal education in any part of this island, that the law of England has been directly the reverse for more than half a century.

No other reference to any known writer of eminence is produced; it is easy, therefore, to strike the balance upon this class of authorities; they are all in one scale,—a very ponderous mass on one side, and totally unresisted on the other.

I come, thirdly, to the last and highest class of authorities,—that of cases decided in the Scotch tribunals. Many of these have been alluded to in the

* Page 32.

learned expositions which have been quoted, but such of them (and they are not few in number) as apply to the cases of promises *de futuro cum copulâ*, I dismiss for the present, observing only, that if a promise of this kind be equivalent to a contract *de præsenti nullis fictibus*, the result of those cases appears to me strongly to incline to the conclusion deduced from the two former classes of authority.

With regard to decided cases, I must observe generally, that very few are to be found in any administration of law in any country, upon acknowledged and settled rules. Such rules are not controverted by litigation, they are therefore not evidenced by direct decision: they are found in the maxims and rules of books of text-law. It would be difficult, for instance, to find an English case in which it was directly decided that the heir takes the real, and the executor the personal estate; yet, though nothing can be more certain, it is only incidentally, and *obiter*, that such a matter can force itself upon any recorded observation of a Court; equally difficult would it be to find a litigated case in the Canon Law, establishing the doctrine that a contract *per verba de præsenti* is a present marriage, though none is more deeply radicated in that law.

The case of Cochrane *versus* Edmonstone, before the Court of Session in the year 1804, was a case of contract *de præsenti*, and of this I shall take the account given by Mr Clerk. The Court there held, "that a written acknowledgment *de præsenti* was sufficient to constitute a marriage. The interlocutor

of the Lord Ordinary, which the Court adhered to, rests upon the consent of parties to constitute a marriage *de præsenti* without referring to the *copula*." Mr Clerk says, "he cannot suppose the Court overlooked the very material circumstance of the *copula*," which did exist in that case, and which, he says, would have been sufficient, with a bare promise, to bind the man to marriage." I find great difficulty in acceding to this observation, particularly when it is stated that the Court adhered to the interlocutor, which expressed the directly contrary doctrine, and even if it had not so done, it appears to me to be an inaccuracy too striking to attribute to that Court, that they should have declared consent *de præsenti* sufficient, without express mention of the *copula*, if they had thought it a necessary ingredient in the validity of the marriage. What Mr Clerk says of his disposition to advise an appeal, in particular cases, is not necessary to be noticed in the present consideration, which regards only actual decisions, and not private opinions, however respectable. He admits expressly, that, on the evidence of the report, he thinks it at least highly probable, that some such doctrine as that held by Mr Erskine, was laid down in that case by the Judges.

The next case which I shall mention is that of Taylor and Kello, which occurred in 1786. This was an action of declarator of marriage instituted by Patrick Taylor against Agnes Kello, and was grounded on a written acknowledgment in the following words:— "I hereby declare you, Patrick Taylor, in Birken-

shaw, my just and lawful husband, and remain your affectionate wife, Agnes Kello." Kello delivered this written declaration to Taylor, and received from him another, *mutatis mutandis*, in the same terms, which she afterwards destroyed. There was no sufficient evidence to support the *concubitus*, but the report states that *the Court, in its decision, held this to be out of the question*. The Commissaries "found the mutual obligations relevant to infer marriage between the parties, and found them married persons accordingly." This sentence was affirmed by the Court of Session, though that Court was much divided upon the occasion, some of the judges considering the declaration as merely intended to signify a willingness to enter into a regular marriage; but a majority of the Court thought, in conformity to the judgment of the Commissaries, that the marriage was sufficiently established. This sentence was reversed by the House of Lords, but upon the express grounds that neither of the parties understood the papers respectively signed by them to contain a final agreement to consider themselves as married persons; on the contrary, it was agreed that the writing was to be delivered up whenever it was demanded; the whole subsequent conduct of the parties proving this sort of agreement.

It appears, then, that this was not considered by the House of Lords an *irrevocable* contract, such as that of marriage is in its own nature, from which the parties cannot resile even by joint consent, much less on the demand of one party only. This case, I think, goes strongly to affirm the doctrine, that an *irrevo-*

cable contract de præsenti does of itself constitute a legally valid marriage. Mr Catheart admits, in his deposition, that this sentence of the Commissaries, confirmed by the Court of Session, would have been a decision in favour of the doctrine, that a contract *de præsenti* constitutes a marriage, if it had not been reversed by the House of Lords. But as it was clearly reversed upon other grounds, the authority of the two Courts stands entire in favour of the doctrine. Mr Gillies thinks the reversal hostile to the doctrine, but he has not favoured the Court with the grounds on which he entertains this opinion. Mr Clerk contents himself with saying, that the doctrine is not recognized: most assuredly it is not disclaimed; on the contrary, the presumption is, that if the contract had been considered *irrevocable*, the House of Lords would have attributed to it a very different effect.

In the case of Inglis against Robertson, which was decided in the same year, the Commissaries sustained a marriage upon a contract *de præsenti*, and this sentence was affirmed by the Court of Session upon appeal, and afterwards by the House of Lords. The accounts vary with respect to the proof of *concubitus* in this case, which renders it doubtful whether the decision was grounded on the acknowledgment only, or referred likewise to the *copula*. If it had no such reference, then it is a case directly in point: but if it had, it certainly cannot be insisted upon as authority upon the present question.

The case of Ritchie and Wallace, which was before the Court of Session in 1792, is not reported in any

of the books, but is quoted by Mr Hamilton, who was of counsel in the cause. It was the case of *a written declaration of an existing marriage, but accompanied with a promise that it should be celebrated in the church at some future and convenient time.* This very circumstance of a provision for a future public celebration might of itself have raised the question, in the minds of some Judges, whether these acknowledgments could be considered as relating to a matrimonial contract already formed and perfected in the contemplation of the parties themselves; and this is sufficient to account for the diversity of the opinion of the Judges upon the case, without resorting to any supposed difference of opinion on the general principle of law now controverted. The woman was pregnant by the man when she received this written declaration from him, but, as I understand the case, nothing rested in judgment upon this fact; for Mr Hamilton says, the woman *founded on the written acknowledgment* as a *declaration de præsenti* constituting a marriage, which conclusion of law was controverted by the man; but the Court, by a majority of six Judges to three, found the *acknowledgment libelled relevant to infer the marriage.*

The case of M'Adam against Walker (13th November 1806), which underwent very full discussion, is by all parties admitted to be a direct decision upon the point, though it was certainly attended with some difference of opinion amongst the Judges by whom it was decided. In that case Elizabeth Walker had cohabited with Mr M'Adam, and borne him two

daughters. In the presence of several of his servants, whom he had called into the room for the purpose of witnessing the transaction, he desired Elizabeth Walker to stand up and give him her hand; and she having done so, he said "This is my lawful wife, and these my lawful children." On the same day, without having been alone with Walker during the interval, he put a period to his existence. The Court held the children to be legitimate. It appears clearly that, in this case, there had been a *copula* antecedent, though none could have taken place subsequent to the declaration: It could not therefore have been upon the ground of want of *copula* that Sir Ilay Campbell, who holds a prior *copula* as good as a subsequent one, joined the minority in resisting that judgment. It is stated by Mr Hutcheson, as a matter of fact, that "none of the Judges disputed the law," but there were other grounds of dissent, arising out of the circumstances of the case, unconnected with the legal question. "The Judges entertained doubts of the sanity of Mr M'Adam at the time of the marriage; they considered also, that when he made the declaration he had formed the resolution of suicide, and therefore did not mean to live with the woman as his wife." It is said that this decision of the Court of Session is appealed from, and therefore cannot be held conclusive upon the point. At any rate it expresses the judgment of that Court upon the principle, and the appeal, whatever the ground of it may be, does not shake the respect which I owe to that authority whilst it exists unshaken.

I might here call in aid the numerous cases where promise *cum copulâ* has been admitted to constitute a marriage, if the rule of the Canon Law, transfused into the law of Scotland, be sound, that *copula* converts a promise *de futuro* into a contract *de præsenti*. If it does not, if *copula* is required in a contract *de præsenti*, what intelligible difference is there between the two—between a promise *de futuro* and a contract *de præsenti*?—None whatever. They stand exactly upon the same footing.—A proposition, I will venture to say, never heard of in the world, except where positive regulation has so placed them, till these recent controversies respecting the state of the marriage law of Scotland.

I might also advert to the marriages at Gretna Green, where the blacksmith supplies the place of the priest or the magistrate. The validity of these marriages has been affirmed in England upon the certificates of Scotch law, without reference to any act of consummation, for such I think was clearly the exposition of the law as contained in the opinion of Sir Ilay Campbell, upon which the English Court of Chancery founded its decision in the case of Grierson and Grierson.

What are the cases which have been produced in contradiction to this doctrine?—As far as I can judge, none,—except cases similar to those which have been already stated, where the superior Court has overruled the decisions of the Court below, and pronounced against the marriage, upon grounds which leave the principle perfectly untouched.—The case

of M'Lauchlan contra Dobson, in December 1796, was a case of contract *per verba de præsenti* where there was no *copula*, in which the Commissaries declared for the validity of the marriage, and the interlocutor was altered by the Court of Session. But upon what grounds was that sentence reversed? Mr Hutcheson states, that "the Court did not think there was sufficient evidence of a real *de præsenti* matrimonial consent." Mr Hume says, "the conduct of the parties had been variable and contradictory;" and Sir Ilay Campbell says, there were "circumstances tending to shew that the parties did not truly mean to live together." The dicta of Lord Justice-Clerk M'Queen have been quoted and much relied upon; but I must observe, that they come before the Court in a way that does not entitle them to much judicial weight: they are stated by Mr Clerk to be found in notes of the handwriting of Mr Henry Erskine, who is not himself examined for the purpose of authenticating them, although interrogatories are addressed to other persons with respect to other legal authorities, for which they are much less answerable. They are taken very briefly, without any context, nor is it stated in what manner, whether in the form of discussion or decision, they fell from that learned Judge. He is, however, made to say, "The case of M'Lauchlan against Dobson is new, but the law is old and settled. Two facts admitted *hinc inde*, no celebration, no *concubitus*, nor promise of marriage followed by *copula*; contract as to land not binding till regularly executed, unless where *res non sunt inte-*

græ." This proposition that, " contract as to land not binding till regularly executed," proves little, because it may refer to rules that are confined to agreements respecting that species of property, and even with regard to that species of property the contract may be sufficiently executed by the signing of articles or deeds, though there is no entry upon the land. " A promise without *copula, locus pœnitentiæ*—even verbal consent *de præsenti* admits *pœnitentia,*"—that is the matter to be proved. " Form of contracts contains express obligation to celebrate; till that done either party may resile."—The reason is that these same forms contain words which qualify the present engagement by giving them a mere promissory effect. " Private consent is not the *consensus* the law looks to. It must be before a priest or *something equivalent;* they must take the oath of God to each other;" this may be done in private to each other, as it actually was done in the case of Lord Fitzmaurice: " a present consent not followed by any thing may be mutually given up, but if so it cannot be marriage." To be sure if the propositions contained in these dicta are correct, if it be true that a contract *de præsenti* may be mutually given up, then certainly it cannot constitute a marriage; but that is the very question which is now to be determined upon the comparative weight of authorities; I admit the authority of Lord Braxfield, deliberately and directly applied to any proposition to which his mind was addressed, to be entitled to the highest respect; but I have already adverted to the loose manner in which these dicta are

attributable to him, and it is certainly a pretty strong circumstance against giving full effect to these dicta so introduced, without context and without authentication, that Lord Braxfield, as Lord Ordinary, refused the Bill of Advocation in the case of Taylor and Kello complaining of the sentence of the Consistorial Court, which found "mutual obligations relevant to infer a marriage."

The other case that has been mentioned, is that of M'Innes against More, which came before the House of Lords upon appeal in the year 1782. The facts therein were, that the man, at the woman's desire, had signed the acknowledgment not for the purpose of making a marriage, but merely as a colour to serve another and different purpose mutually concerted between them, namely, that of preventing the disgrace arising from the pregnancy of the woman. The Commissaries and the Court of Session had found the facts relevant to infer a marriage, but the House of Lords, considering the transaction as a mere blind upon the world, and that no alteration of the *status personarum* was ever intended by the parties themselves, reversed the sentence and pronounced against the marriage.

I am not aware of any other decided cases which have been produced against the proposition, that a contract *de præsenti* (be it in the way of *declaration* or *acknowledgment*) *constitutes*, or, if you will, *evidences* a marriage. It strikes me, upon viewing these cases, that such of them as are decided in the affirmative, have been adjudged directly upon this *principle*,

and that where they have been otherwise determined, it turns out that they have rested upon *specialties*, upon circumstances which take them out of the common principle, and produce a determination that they do not come within it. If they do not go directly to the extent of affirming the principle, they at least imply a recognition of it, a sort of tacit assent and submission to its authority, an acknowledgment of its being so deeply intrenched in the law, as not to be assailable in any general and direct mode of attack. The exceptions prove the rule to a certain degree. It was proved in all those cases where there was a judgment apparently contradictory, that in truth they were not real matrimonial contracts *de præsenti*. The effect was not attributed to them, because they were not considered as such contracts. I cannot but think, that when case upon case came before the House of Lords, in which that principle was constantly brought before their eyes, they would have reprobated it as vicious if they had deemed it so, instead of resorting to circumstances to prove that the principle could not be applied to them. I may without impropriety add, that the Lord Chancellors of England have always, as I am credibly informed, in stating their understanding of Scotch law upon such subjects to the House of Lords, particularly Lord Thurlow, been anxious to hold out that law to be strictly conformable to the canonical principles, and have scrupulously guarded the expressions of the public judgments of the House, against the possible imputation of admitting any contrary doctrine.

Upon the whole view of the evidence applying to this point, looking first to the rule of the general matrimonial law of Europe,—to the principle which I venture to assume, that such continues to be the rule of Scotch matrimonial law, where it is not shewn that that law has actually resiled from it,—to the opinions of eminent professors of that law,—to the authority of text writers, and to the still higher authority of decided cases (even without calling in aid all those cases which apply a similar rule to a promise *cum copulâ*) I think that being compelled to pronounce a judgment upon this point, I am bound to say, that I entertain as confident an opinion as it becomes me to do, that the rule of the law of Scotland remains unshaken; that the contract *de præsenti* does not require consummation in order to become "very matrimony;" that it does, *ipso facto*, *et ipso jure*, constitute the relation of man and wife. There are learned and ingenious persons in that country, who appear to think this rule too lax, and to wish to bring it somewhat nearer to the rule which England has adopted: but on the best judgment which I can form upon the subject, it is an attempt against the general stream of the law, which seems to run in a direction totally different, and is not to be diverted from its course by efforts so applied. If it be fit that the law of Scotland should receive an alteration, of which that country itself is the best judge, it is fit that it should receive that alteration in a different mode than that of mere interpretation.

When I speak of a contract, I mean of course one

that is attended with such qualifications as the law of Scotland requires for such a contract, and which in truth appear to me to be very little more than what all law requires for all contracts of every description, and without which an apparent contract upon any subject is, in truth, no contract at all; for having been led, by the manner in which these qualifications are sometimes described, to suppose at first, that they were of a *peculiar and characteristic* nature, I really cannot, upon consideration, discover in them any thing more than the *ordinary* qualifications requisite in all contracts. It is said that the marriage contract must *not be extorted by force or fraud.* Is it not the general law of contracts, that they are vitiated by proof of either? In the present case, *menace* and *terror* are pleaded in Mr Dalrymple's allegation as to the execution of the first *contract* No. 2, for as to the *promise* No. 1. he admits that it was given *merely at the entreaties and instigation of the lady*, (an admission not very consistent with the suggestion of the terror afterwards applied); but he asserts that he executed this contract, "being absent from his regiment, without leave, alone with her, and unknown to her father, and urged by her threats of calling him in."—What was to be the effect of calling in the father, which produced so powerful an impression of terror in his mind, he does not explain; still less does he attempt to prove the *fact*, for he has not read the only evidence that could apply to it, the sworn answers of the lady to this statement of a transaction passing secretly between themselves, and in which answers it

is positively denied. This averment of menace and terror is perfectly inconsistent with every thing that follows; with the reiterated declaration contained in No. 10. and with the letters which he continued to write in the same style for a year afterwards. Could the paper No. 10, have been executed by a man smarting under the atrocious injury of having been compelled by *menaces* to execute one of the like import? Could these letters, breathing sentiments of unalterable fondness, have been addressed to the person by whom he had been so treated? Nothing can be apparently more unfounded than this suggestion of menace and terror. It is said that it must be a *deliberate* contract. It is, I presume, implied in all contracts, that the parties have taken that time for consideration which they thought necessary, be that time more or less, for nowhere is there assigned a particular *tempus deliberandi* for the marriage contract, any more than for any other contract.

It is said that it must be *serious*, so surely must be all contracts; they must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever; at the same time it is to be presumed, that serious expressions, applied to contracts of so serious a nature as the disposal of a man or woman for life, have a serious import. It is not to be presumed *a priori*, that a man is sporting with such dangerous play-things as marriage engagements. Again it is said that the *animus contrahentium* must be regarded: Is that peculiar to the marriage contract? It is in the

intention of the parties that the substance of every species of contract subsists, and what is beyond or adverse to their intent does not belong to the contract. But then that intention is to be collected (primarily at least) from the words in which it is expressed; and in some systems of law, as in our own, it is pretty exclusively so to be collected. You are not to travel out of the intention expressed by the words, to substitute an intention totally different and possibly inconsistent with the words. By the matrimonial law of Scotland a latitude is allowed, which to us (if we had any right to exercise a judgment on the institutions of other countries with which they are well satisfied) might appear somewhat hazardous, of substituting another serious intention than that which the words express, to be proved by evidence extrinsic, and totally, as we phrase it, *dehors* the instrument. This latitude is indulged in Scotland to a very great degree indeed, according to Mr Erskine. In all other countries a solemn marriage *in facie Ecclesiæ facit fidem*; the parties are concluded to mean seriously, and deliberately, and intentionally, what they have avowed in the presence of God and man, under all the sanctions of religion and of law;—Not so in Scotland, where all this may pass, as Mr Erskine relates, and yet the parties are at liberty to shew, that, by virtue of a private understanding between themselves, all this is mere imposition and mockery, without being entitled to any effect whatever.

But be the law so, still it lies upon the party, who impeaches the intention expressed by the words, to

answer two demands which the law, I conceive, must be presumed to make upon him; first, he must assign and prove some other intention; and secondly, he must also prove that the intention so alleged by him, was fully understood by the other party to the contract, at the time it was entered into: For surely it cannot be represented as the law of any civilized country, that in such a transaction a man shall use serious words, expressive of serious intentions, and shall yet be afterwards at liberty to aver a private intention, reserved in his own breast, to avoid a contract which was differently understood by the party with whom he contracted. I presume, therefore, that what is said by Mr Craigie can have no such meaning, "that if there is reason to conclude, from the expressions used, that both or *either* of the parties did not understand that they were truly man and wife, it would enter into the question whether married or not," because this would open a door to frauds, which the justice, and humanity, and policy of all law must be anxious to keep shut. In the present case no other *animus* is set up and endeavoured to be substituted, but the *animus* of avoiding danger, on which I have already observed. The assignment of that intent does almost necessarily exclude any other, and indeed no other is assigned; and as to any plea that it was differently understood by Miss Gordon, the other party in this cause, no such is offered, much less is any proof to that effect produced, unless it can be extracted from the letters.

Do they qualify the express contracts, and shew a different intention or understanding? It has been

argued that they contain some expressions which point to apprehensions, entertained by Miss Gordon, that Mr Dalrymple would resile from the obligations of the contract, and others that are intended to calm those apprehensions by promises of eternal fidelity, both which it is said are inconsistent with the supposition that they had knowingly constituted themselves husband and wife, and created obligations *de præsenti*, from which neither of them could resile.

In the first place, is there this real inconsistence? Do the records of this Court furnish no such instance as that of the desertion of a wife by her husband? And is such an occurrence so entirely out of all reasonable apprehension in a case like the present? Here is a young gentleman, a soldier, likely to be removed into a country in which very different ideas of marriage prevail, amongst friends who would discountenance this connection, and amongst numerous objects which might divert his affections, and induce him to repent of the step he had taken in a season of very early youth, and in a fit of transient fondness: That a wife left in that country, exposed to the chances of a change in his affections,—to the effect of a long separation,—to the disapprobation of his friends,—to the impressions likely to be made by other objects upon a young and unsettled mind, should anticipate some degree of danger is surely not unnatural; equally natural is it, that he should endeavour to remove them by those renewed professions of constancy. But supposing that Miss Gordon really did entertain doubts with respect to the validity of her marriage, what

could be the effect of such doubts? Surely not to annul the marriage, if it were otherwise unimpeached. We are, *at this moment*, enquiring with all the assistance of the learned professors of law in that country, amongst whom there is great discordance of opinion, what is the effect of such contracts. That private persons, compelled to the necessity of a secret marriage, might entertain doubts whether they had satisfied the demands of a law which has been rendered so doubtful, will not affect the real sufficiency of the measures they had taken. Mr Dalrymple might himself entertain honest doubts upon this point; but if he felt no doubt of *his own meaning*, if it was his intention to bind himself so *far as by law he could*, that is enough to sustain the contract; for it is not his uninformed opinion of law, but his real intention that is to be regarded. A *public* marriage was impracticable; he does all that he can to effect a marriage which was *clandestine*, not only at the time, but which was intended so to continue. The language is clear and unambiguous in the expression of intent. No other intention is assigned: and it is not such expressions as those arising naturally out of the feelings which must accompany such a transaction, that can at all affect its validity.

The same observations apply to the expressions contained in the later letters written to Mr Hawkins. In one of them she says, "My idea is, that he is not aware how binding his engagements are with me," and possibly he might not. Still if he meant at the time to contract *so far by law as he could*, no doubts

which accompanied the transaction, and still less any which followed it, can at all alter its real nature and effect. Miss Gordon had likewise her later hours of doubt, and even of despondency, " You will never see me Mrs Dalrymple," she says, in the spring of 1807, to her sister; and when it is considered what difficulties she had to encounter, at what an immense distance she then stood from the legal establishment of her claims, having lost her hold on his affections, it cannot be matter of great surprise, if, in the view of a prospect so remote and cloudy, some expression of dismay and even of despair, should occasionally betray the discomposure of her mind. As to what she observes upon the alternative suggested by some friend, of a large sum of money in lieu of her rights (a proposition which she indignantly rejects) it seems to point rather to a corrupt purchase of her silence, than to any idea existing in her mind of a claim of damages, by way of a legal *solamen*, for the breach of a mere promissory contract.

The declarations therefore, not being impeached by any of those disqualifications by which, in the law of Scotland, a contradictor is permitted to redargue and overcome the presumption arising from the production of such instruments, they become, in this stage of the matter, *præsumptiones juris et de jure* that found an instant conclusion of marriage, if I am right in the position that carnal copulation is not absolutely required to its completion. The fact that these papers were left in her single possession is insignificant, for it has well been observed by Dr Barnaby, that it is

not mutuality of *possession*, but mutuality of *intention*, that is requisite. It is much more natural that they should be left in the possession of the lady, she being the party whose safety is the more special object of protection; but there is no proof here, that Mr Dalrymple himself is not possessed of a similar document. He anxiously requested to have one, and the non-production of it by him furnishes no conclusive proof that he did not obtain his request. If he did not, it may have been an act of imprudence, that he confided the proofs of his marriage entirely to the honour of the lady; but if he did, it is perfectly clear that she has not betrayed the trust.

But I will now suppose that this principal position is wrong: that it is either extracted from erroneous authorities, or erroneously extracted from authorities that are correct. I will proceed then to inquire what proof there is of carnal copulation having taken place between the parties; and, upon this point, I shall content myself with such evidence as the general law requires for establishing such a fact; for I find no reference to any authority to prove that the law of Scotland is more rigid in its demand, where the fact is to be established in support of a marriage, than for any other purpose. It may have happened that the fact of carnal copulation has been established by a pregnancy, or some other evidence of as satisfactory a kind, in the few cases which have been transmitted to us, but I find no such exclusive rule as that which has been ingeniously contended for by Dr Edwards; and I take it as an incontrovertible position, that the

circumstances, which would be sufficient to prove intercourse in any other case, would be equally sufficient in this case. I do not charge myself in so doing, with going farther than the Scotch Courts would do, and would be bound to do, attending to the established rules of evidence.

In the first place, I think it is most strongly to be inferred from the paper, No. 2, that some intercourse of a conjugal nature passed between these parties. Miss Gordon therein says, "I hereby promise that nothing but the greatest necessity, (necessity which ——— situation alone can justify), shall ever force me to declare this marriage." Now what other possible explanation can be given of this passage, or how can it be otherwise understood than as referring to the consequences which might follow from such an intercourse? I confess that I find myself at a loss to know how the blank can be otherwise filled up, than by a supposition of consequences which would speak for themselves, and compel a disclosure.

I observe that Mr Dalrymple denies, in his allegation, that any intercourse took place *after* the date of the written declarations, which leaves it still open to the possibility of intercourse *before* that time, though he certainly was not called upon to negative a preceding intercourse, in consequence of any assertion in the libel which he was bound to combat. It will, I think, be proper to consider the state of mind and conduct of the parties relatively to each other at this time. Preliminary verbal declarations of mutual attachment must at least have passed (as I have al-

ready observed) before the promise contained in No. 1. was written. In the first letter, which bears the postmark of the 27th of May, whether relying on this paper if it then existed, or on declarations which had verbally passed between them, he thinks himself entitled to address her as his wife in the most endearing terms. On the following day, the 28th, the instrument which has been produced is signed, by which they mutually acknowledge each other as husband and wife. Letters continue to pass between them daily, and sometimes more than once in a day, expressive of the most ardent and eager affection on his part, which can leave no room for the slightest doubt that he was, at that time, most devotedly attached to her person, and desirous of the pleasures connected with the enjoyment of it, in some way or other; for to what other motive can be ascribed such a series and style of letters from a young man, writing voluntarily, without any appearance of idle pleasantry, and with every character of a sincere pursuit, whether honourable or otherwise. What was the state of mind and conduct of the lady during this period of time? It is not to be presumed, from the contents of his letters, that she was either indifferent or repulsive.

The imputation, indeed, which has been thrown upon her, is of a very different kind,—that she was an acute and active female, who, with a knowledge of the law of the country, which Mr Dalrymple did not possess, was endeavouring, *quâcunque viâ datâ*, to engage him in a marriage. To this marriage she has inflexibly adhered, and now stands upon it before

this Court; so that whatever might be the real state of her affections towards this gentleman (which can be known only by herself), this at least must be granted, that she was most sincerely desirous of this marriage connexion, which marriage connexion, both of them perfectly well knew, could not be publicly and regularly obtained.—Taking, then, into consideration these dispositions of the parties, *his* desire to obtain the enjoyment of her person on the one hand, and *her* solicitude to obtain a marriage on the other, which after the delivery of such instruments she knew might at all events be effectually and honourably obtained by the mere surrender of her person, what is the probable consequence? In this part of the island the same circumstances would not induce the probability of a *private surrender*, because a *public ceremony* being here indispensably required, no young woman, acting with a regard to virtue, and character, and common prudence, would surrender her person in a way which would not only not constitute a marriage, but would in all probability defeat all expectation of such an event.

In Scotland the case is very different, because in that country, if there are circumstances which require the marriage to be kept secret, the woman, after such private declarations past, carries her virgin honours to the private nuptial bed, with as much purity of mind and of person, with as little violation of delicacy, and with as little loss of reputation, as if the matter was graced with all the sanctities of religion. It is in vain to talk of criminality, and of grossness, and of

gross ideas. In such a case, there are no other ideas excited than such as belong to matrimonial intercourse. It is the "bed undefiled," according to the notions of that country: it is the actual *ceremony* as well as the *substance* of the marriage: it is the conversion of the lover into the husband: *transit in matrimonium*, if it was not *matrimonium* before. A most forcible presumption, therefore, arises, that parties so situated would, for the purpose of a secret marriage, resort to such a mode of effecting it, if opportunities offered; it must almost, I think, be presumed, that Mr Dalrymple was in that state of incapacity to enter into such a contract, which Lord Stair alludes to, if he took no advantage of such opportunities; for nothing but the want of opportunity can repel such a presumption.

Now how does the evidence stand with respect to the opportunity of effecting such a purpose? The connexion lasted during the whole of Mr Dalrymple's stay in Scotland, and was carried on, not only by letters couched in the most passionate terms, but as admitted (and, indeed, it could not be denied), by nocturnal private visits, frequently repeated, both at Edinburgh and at Braid, the country-seat of Mr Gordon, in the neighbourhood of that city. Upon this part of the case six witnesses have been examined, who lived as servants in the family of Mr Gordon. Grizell Lyall, whose principal business it was to attend on Miss Charlotte Gordon, one of the sisters, but who occasionally waited on Miss Gordon, says, "That Captain Dalrymple used to visit in Mr Gor-

don's family in the spring of 1804: That before the family left Edinburgh she admitted Captain Dalrymple into the house by the front door, by the special order of Miss Gordon, in the evenings: That Miss Gordon's directions to her were, that when she rung her bell once, to come up to her in her bed-room, or the dressing-room off it, when she got orders to open the street door to let in Captain Dalrymple; or when she (Miss Gordon) rung her bell twice, that she should thereupon, without coming up to her, open the street door for the same purpose: That, agreeably to these directions, she frequently let Captain Dalrymple into the house about nine, ten, or eleven o'clock at night, without his ever ringing the bell or using the knocker: That the first time he came in this way, she shewed him up stairs to the dressing-room off the young ladies' bed-room, where Miss Gordon then was, but that afterwards, upon her opening the door, he went straight up stairs, without speaking or being shewn up; but how long he continued up stairs she does not know, as she never saw him go out of the house: That the dressing-room above alluded to was on the floor above the drawing-room, and adjoining to the bed-room where the three young ladies slept; and next to the ladies' bed-chamber was another room, in which there was a bedstead with a bed and blankets, but no curtains or sheets to the bed, and it was considered as a lumber room, the key of which was kept by Miss Gordon."—She says that she recollects, and it is a fact in which she is confirmed by another witness, Robertson, "that the

family removed from Edinburgh to Braid that year, 1804, on the evening before a King's Fast," (the King's Fast Day for that year was on the 7th of June), "and on a Wednesday, as she thinks, as the Fast Days are generally held on a Thursday: That at this time Miss Charlotte was at North Berwick, on a visit to Lady Dalrymple: That Mr Gordon and Miss Mary went to Braid in the evening, but Miss Gordon remained in town, as she Lyall also did, and Mr Robertson the butler, and one or two more of the servants."

It appears from the testimony of other witnesses, that Mr Gordon, her father, appeared much dissatisfied that this lady did not accompany himself and her sister to Braid, but chose to stay in town upon that occasion. There are passages in Mr Dalrymple's letters which point to the necessity of her continuance in town, as affording more convenient opportunities for their meeting. Lyall states "that she recollects admitting Captain Dalrymple that evening, as she thinks, some time between ten and twelve o'clock, and he went up stairs to Miss Gordon without speaking: That on the next morning she went up as usual to Miss Gordon's bed-room about nine o'clock, and informed her of the hour; and having immediately gone down stairs, Miss Gordon rung her bell some time after; and on the deponent going up to her, she met her, either at the bed-room door or at the top of the stairs, and desired her to look if the street door was locked or unlocked; and the deponent having examined, informed her that it was

unlocked, and immediately after went into the dressing-room, and, after being a very short time in it, she heard the street door shut with more than ordinary force, which having attracted her notice, she opened the window of the dressing-room which is to the street, and on looking out she observed Captain Dalrymple walking eastwards from Mr Gordon's house: That from this time she suspected that Captain Dalrymple was the person who had gone out of the house just before: That nobody could have come in by the said door without being admitted by some person within, as the door did not open from without, and she heard of no person having been let into the house on this occasion: That having gone down stairs after this, Mr Robertson, the butler, observed to her, *that there had been company up stairs last night*; but she did not mention to him any thing of her having let in Captain Dalrymple the night before, or of her suspicions of his having just before gone out of the house, at least she is not certain, but she recollects that he desired her to remember the particular day on which this happened."—Now, from this account given by Lyall, the counsel have attempted to raise a doubt whether it was Mr Dalrymple who went out, for it is said that he would have cautiously avoided making a noise for fear of exciting attention. But the account Lyall gives is exactly confirmed by Robertson, who deposes, "That, on the 7th of June, which was the King's Fast, as he was employed about ten o'clock in the morning in laying up some china in his pantry, which is immediately off

the lobby, he observed Captain Dalrymple come down stairs, and passing through the lobby to the front door, unlock it, and go out and shut the door after him." Some observations have been made with respect to Robertson's conduct, and he has been called a forward witness, because he made a memorandum of this circumstance at the time it occurred; but I think his conduct by no means unnatural. Here was a circumstance of mysterious intercourse that attracted the attention of several of the servants, and it is not at all surprising that this man, who held a superior situation amongst them in Mr Gordon's family, and who appears to be an intelligent, well educated, and observing person, as many of the lower order of persons in that country are, should think it right, in the zeal he felt for the honour of his master's family, to make a record of such an occurrence. In so doing, I do not think that he has done any thing more than is consistent with the character of a very honest and understanding servant, who might foresee that such a record might, one day or other, have its use. The witness Lyall goes on to say, "That Miss Gordon and herself went to Braid that day (being the King's Fast) before dinner, and that, on that evening, or a night or two after, she was desired by Miss Gordon to open the window of the breakfasting parlour to let Captain Dalrymple in, and she did so accordingly, and found Captain Dalrymple at the outside of the window when she came to open it; and this she thinks might be between ten and twelve o'clock, and she shewed him up stairs,

when they were met by Miss Gordon at the door of her bed-chamber, when they two went into said chamber, and she returned down stairs: That she does not know how long Captain Dalrymple remained there with Miss Gordon, or when he went away." She states that "Miss Charlotte returned from her visit at North Berwick a few days after Miss Gordon and the deponent went to Braid: That at Braid Miss Gordon and Miss Charlotte slept in one room, and Miss Mary in another: That within Miss Gordon and Miss Charlotte's bed-chamber there was a dressing-room, the key of which Miss Gordon kept; and she recollects one day getting the key of it from Miss Gordon to bring her a muff and tippet out of it, and upon going in she was surprised to find in it a feather-bed lying upon the floor, without either blankets or sheets upon it, so far as she recollects: That it struck her the more, as she had frequently been in that room before without seeing any bed in it; and as Miss Gordon kept the key, she imagined she must have put it there herself: That she found this bed had been taken from the bed-chamber in which Miss Mary slept, it being a double-bedded room: That when she observed the said bed in the dressing-room, it was during the time that Captain Dalrymple was paying his evening visits at Braid: That upon none of the occasions that she let Captain Dalrymple into Braid House did she see him leave it, nor did she know when he departed." Three other witnesses, Robertson and the two gardeners, have been examined upon this part of the case, and

they all prove that Mr Dalrymple was seen going into the house in the night, or coming out of it in the morning.

It is proved likewise that Porteous, one of the servants, was alarmed very much, that the window of the room where he kept his plate, was found open in the morning, and that it must have been opened by somebody on the inside: It is proved that nothing was missing, not an article of plate was touched, and that Mr Dalrymple was seen by the two gardeners very early in the morning, coming away from the house, and in the vicinity of the house, going towards Edinburgh; and as to what was suggested that he might have been in the out-houses all night, I think it is not a very natural presumption, that a gentleman who was privately and habitually admitted into the house at such late hours as eleven or twelve o'clock at night, would have been ejected afterwards for the purpose of having so uncomfortable a situation for repose, as the gentlemen suppose, in some of the stables or hovels belonging to the house.—There is another witness of the name of Brown, Mr Dalrymple's own servant, whose evidence is strongly corroborative of the nature of those visits. This man is produced as a witness by Mr Dalrymple himself, and he states that he was in the habit of privately conveying notes from his master to Miss Gordon, which were to be concealed from her father. He says to the second interrogatory, that he often accompanied his master to Mr Gordon's house at Edinburgh, but he cannot set forth the days upon which it was he so

attended him there, except that it was between the 10th of May and the 18th of July 1804;" subsequently, therefore, to the execution of the last paper. This witness further states, " That *on the night of the 18th of July*, which was the last time Mr Dalrymple was in or near Edinburgh, in the said year 1804, he, by the orders of his master, waited with the curricle at the house of Charles Gordon, Esq. till about twelve o'clock, when Mr Dalrymple came out of the said house, and got into the curricle, and rode away therein about a mile on the road towards Edinburgh, and then desired him to stop; and having told him to go and put up his horses in Edinburgh, and to meet him again on the same spot at six o'clock the next morning with the curricle, Mr Dalrymple then got out, and walked back towards the said Mr Gordon's house; and on the next morning at six o'clock he met his master at the appointed spot, and brought him in his said curricle to Haddington, from whence he went in a chaise to the house of a Mr Nisbet, in the neighbourhood of that town, where Mr Dalrymple's father was then staying: That *he does believe that Mr Dalrymple did, on the night of the 18th of July, go back to, and remain in the said Mr Gordon's country-house:* and I think it is impossible for any body who has seen this man's evidence, and the evidence of the other witnesses, not to suppose that he did go there, and did take his repose for the night in that house. Now it is said, and truly said, in this case, that the witness Lyall, upon her cross-examination, says, " she does not think that they

could have been in bed together, so far as she could judge." What means she took to form her judgment does not appear,—the view taken by her might be very cursory. She is an unmarried woman, and might be mistaken with respect to appearances, or the appearances might be calculated for the purposes of deception, in a connection which was intended to be, to a great degree, secret and clandestine. But the question is not what inference Lyall draws, but what inference the Court ought to draw from the fact proved by her evidence, that Mr Dalrymple passed the whole of the night in Miss Gordon's room under all the circumstances described, with passions, motives, and opportunities all concurring between persons connected by ties of so sacred a nature.

Lady Johnstone, one of her sisters, has been relied upon as a strong witness to negative any sexual intercourse; and I confess it does appear to me rather an extraordinary thing, that that lady's observations and surmises should have stopped short where they did, considering the circumstances which might naturally have led her to observe more and to suspect more: she certainly was kept in the dark, or at least in a twilight state. It rather appears from the letters, that there were some quarrels and disagreements between Mr Dalrymple and the gentleman who afterwards married this lady, and who was then paying his addresses to her; how far that might occasion concealment from her I cannot say. The father, for reasons of propriety and delicacy respecting himself and family, was to be kept in ignorance, and

therefore it might be proper that only half a revelation should be made to the sister. She certainly states that, upon her return to Braid, in the middle of June, she slept with her sister, and never missed her from her bed, and never heard any noise in the sister's dressing-room which led her to suppose that Mr Dalrymple was there. I am far from saying that this evidence of Lady Johnstone's is without weight: In truth, it is the strongest adverse evidence that is produced on this point. But she admits, "That from what she had herself observed, she had no doubt but that Mr Dalrymple had made his addresses to her sister in the way of marriage: That when the deponent used to ask her said sister about it, she used to laugh it off." From which it appears that Miss Gordon did not communicate freely with her upon the subject. She says, "That never till after the proceedings in this cause had commenced had she heard that they had exchanged written acknowledgments of their being lawful husband and wife, and had consummated their marriage; but, on the contrary, always, till very lately, conceived that they had merely entered into a written promise with each other, so as to have a tie upon each other, that neither of them should marry another person without the consent of the other of them." That is the interpretation this lady gives to the paper No. 10, though that paper purports a great deal more; and she says, "That although she did suspect that Mr Dalrymple had at some time or times been in her sister's dressing-room, yet she never did imagine that they had consummated a mar-

riage between them." But since it is clearly proved by the other witnesses that Mr Dalrymple was in the habit of going privately to Miss Gordon's bed-room at night, and going out clandestinely in the morning, I cannot think that the ignorance of this witness respecting a circumstance with regard to which she was to be kept in ignorance, can at all invalidate the facts spoken to by the other witnesses, or the conclusion that ought to be deduced from them.

With respect to the letters written at such a time as this, I am not disposed to scan with severe criticism the love-letters of a very young gentleman, but they certainly abound with expressions which, connected with all the circumstances I have adverted to, cannot be interpreted otherwise than as referring to such an intercourse. I exclude all grossness, because, considered as a conjugal intercourse, it carries with it no mixture of grossness but what may be pardonable in a very young man, alluding to the raptures of his honeymoon, when addressing the partner of his stolen pleasures. I will state some passages, however, which appear to point at circumstances of this nature:—"My dearest sweet wife—You are, I dare say, happy at Queen's Ferry, while your poor husband is in this most horrible place, tired to death, *thinking only on what he felt last night, for the height of human happiness was his.*" It is said that this has reference only to the happiness which he enjoyed in her society, for an expression immediately follows, in which he extols the happiness of being in the society of the person beloved: and it may be so, but it must

mean society in a qualified sense of the word, *private* and *clandestine* society; society which commenced at the hour of midnight, and which he did not quit till an early hour (and then secretly) in the morning. That *society* is meant only in the tamest sense of the word, is an interpretation which I think cannot very well be given to such expressions as these, used upon such an occasion. In the letter marked No. 6, he says, "Put off the journey to Braid, if possible, till next week, as the town suits so much better for all parties. I must consult L. on that point to-morrow, as I well know how a-propos plans come into her pretty head. There appears to me only one difficulty, which is where to meet, as there is only one room; but we must obviate that if possible." In the next letter, No. 7, he says, "But I will be with you at eleven to-morrow night; meet me as usual.—P. S. Arrange every thing with L. about the other room."

There are several other expressions contained in these letters which manifestly point to the fact of sexual intercourse passing between them. These I am unwilling to dwell upon with any particular detail of observation, because they have been already stated in the arguments of counsel, and are of a nature that does not incline me to repeat them without absolute necessity; I refer to the letters themselves, particularly to No. 4 and No. 6. But it is said, there are passages in these letters which shew that no intercourse could have passed between them; one in particular in No. 4, is much dwelt upon, in which he says, "Have you forgiven me for what I attempted last night; believe

me, the thought of your cutting me has made me very unhappy." From which it is inferred that he had made an attempt to consummate his marriage, and had been repulsed. Now this expression is certainly very capable of other interpretations: It might allude to an attempt made by him to repeat his pleasures improperly, or at a time when personal or other circumstances might have rendered it unseasonable. In the very same letter he exacts it as *a right*. He says, "You will pardon it; although it was my right, yet I make a determination not too often to exert it; what a night shall I pass without any of those heavenly comforts I so sweetly experienced yesterday."

In a correspondence of this kind passing between parties of this description, and alluding to very private transactions, some degree of obscurity must be expected. Here is a young man heated with passion, writing every day, and frequently twice in a day, making allusions to what passed in secrecy between himself and the lady of his affections; surely it cannot be matter of astonishment, that many passages are to be found difficult of exact interpretation, and which it is impossible for any but the parties themselves fully to explain. What attempt was made does not appear; this I think does most distinctly appear, that he did at this time insist upon his rights, and upon enjoying those privileges which he considered to be legally his own. Wherever these obscure and ill-understood expressions occur, they must be received with such explanations as will render them consistent with the main body and substance of the whole case. Another

passage in the letter No. 5, which is dated on the 30th of May, has been relied upon as shewing that Mr Dalrymple did not consider himself married at that time. In that letter he says, "I am truly wretched, I know not what I write, how can you use me so? but (*on Sunday on my soul* *) you shall, you must become my wife, it is my right," and therefore it is argued that she had not yet become his wife. The only interpretation I can assign to this passage, which appears to have been written when he was in a state of great agitation, is, that on Sunday she was to submit to what he had described as the rights of a husband. It is not to be understood that a public marriage was to be executed between them on that day, because it is clear, from the whole course and nature of the transaction, that no such ceremony was ever intended: It appears from all the facts of the case, that it was to be a private marriage, that it was so to continue, and therefore no celebration could have been intended to take place on that approaching Sunday.

In a case so important to the parties, and relating to transactions of a nature so secret, I have ventured to exercise a right not possessed by the advocates, of looking into the sworn answers of the parties upon this point: and I find Miss Gordon swears positively that intercourse frequently passed between them subsequently to the written declaration or acknowledgment of marriage. Mr Dalrymple swears as confidently that it did not so take place, but he admits that it did on some one night of the month of May, prior

* Torn.

to the signature of the paper marked No. I; the date of which, however, he does not assign, any more than he does that of the night in which this intercourse did take place. Now consider the effects of this admission. It certainly does often happen that men are sated by enjoyment; that they relinquish with indifference, upon possession, pleasures which they have eagerly pursued: But it is a thing quite incredible that a man, so sated and cloyed, should afterwards bind himself by voluntary engagements, to the very same party who had worn out his attachment. Not less inconsistent is this supposition with the other actual evidence in the case, for all these letters, breathing all these ardours, are of a subsequent date, and prove that these sentiments clung to his heart as closely and as warmly as ever during the whole continuance of his residence in Scotland. I ask if it is to be understood, that with such feelings he would relinquish the pleasures which he had been admitted to enjoy, and which he appears to value so highly, or that she would deny him those pleasures for the consolidation of her marriage, which she had allowed him, according to his own account, gratuitously and without any such inducement.

On this part of the case I feel firm. It is not a point of foreign law on which it becomes me to be diffident; it is a matter of fact examinable upon common principles; and I think I should act in opposition to all moral probabilities, to all natural operations of human passions and actions, and to all the fair result of the evidence, if I did not hold that consummation was

fully proved, If this is proved, then is there, according to the common consent of all legal speculation on the subject, an end of all doubt in the case, unless something has since occurred to deprive the party of the benefit of a judicial declaration of her marriage.

What has happened that can have such an effect? Certainly the mere fact of a second marriage, however regular, can have no such effect. The first marriage, if it be a marriage upheld by the law of the country, can have no competitor in any second marriage, which can by legal possibility take place: for there can be no second marriage of living parties in any country which disallows polygamy. There may be a ceremony, but there can be no second marriage—it is a mere nullity.

It is said that, by the law of Scotland, if the wife of the first private marriage chooses to lie by, and to suffer another woman to be trepanned into a marriage with her husband, she may be barred *personali exceptione* from asserting her own marriage. Certainly no such principle ever found its way into the law of England; no connivance would affect the validity of her own marriage; even an active concurrence, on her part, in seducing an innocent woman into a fraudulent marriage with her own husband, though it might possibly subject her to punishment for a criminal conspiracy, would have no such effect. But it is proper, that I should attend to the rule of the law of Scotland upon this subject. There is no proof, I think, upon the exhibition of Scotch law which has been furnished to the Court, that such a principle was ever admitted

authoritatively; for though in the gross case of Campbell *versus* Cochrane, in the year 1747, the Court of Session did hold this doctrine, yet it was afterwards retracted and abandoned, on the part of the second wife, before the House of Lords, which, most assuredly, it would not have been, if any hope had been entertained of upholding it as the genuine law of Scotland, because the second wife could never have been advised to consent to the admission of evidence, which very nearly overthrew the rights of her own marriage. Under the correct application of the principles of that law, I conceive the doctrine of a *medium impedimentum* to be no other than this, That on the *factum* of a marriage, questioned upon the ground of the want of a serious purpose, and mutual understanding, between the parties, or indeed on any other ground; it is a most important circumstance, in opposition to the real existence of such serious purpose and understanding, or of the existence of a marriage, that the wife did not assert her rights, when called upon so to do, but suffered them to be transferred to another woman, without any reclamation on her part. This doctrine of the effect of a mid-impediment in such a case, is consonant to reason and justice, and to the fair representations of Scotch law given by the learned advocates, particularly by Mr Cay, in his answer to the third additional interrogatory, and Mr Hamilton, in his answer to the first further additional interrogatory; but surely no conduct on the part of the wife, however criminal in this respect, can have the effect of shaking *ab initio* an undoubted marriage.

Suppose, however, the law to be otherwise, how is it applicable to the conduct of the party in the present case? Here is a marriage, which, at the earnest request of this gentleman, and on account of his most important interests (in which interests her own were as seriously involved) was not only to be secret at the time of contracting, but was to remain a profound secret till he should think proper to make a disclosure: it is a marriage in which she has stood firm in every way consistent with that obligation of secrecy, not only during the whole of his stay in Scotland, but ever since, even up to the present moment. She corresponded with him as her husband till he left England, not disclosing her marriage even to her own family on account of his injunctions of secrecy. Just before he quitted this country, he renewed in his letters those injunctions, but pointed out to her a mode of communicating with him by letter, through the assistance of Sir Rupert George, the first Commissioner of the Transport Board. In the same letter, written on the eve of his departure for the Continent, he cautions her against giving any belief "to a variety of reports which might be circulated about him during his absence, for if she did, they would make her eternally miserable. I shall not explain," he says, "to what I am alluding, but I know things have been said, and the moment I am gone will be repeated, which have no foundation whatever, and are only meant for the ruin of us both: once more, therefore, I entreat you, if you value your peace or happiness, believe no report about me whatever."

No doubt, I think, can be entertained, that the reports to which he, in this mysterious language adverts, must respect some matrimonial connexions, which had become the subjects of public gossip, and might reach her ear. Nothing, however, less than certain knowledge was to satisfy her, according to his own injunction, and nothing could, I think, be more calculated to lull all suspicion asleep on her part. It appears, however, that it had not that complete effect, for Mr Hawkins says, that upon the return of Mr Dalrymple, in the month of August 1806, when he came to England privately without the knowledge of his father, or of this lady, he then, for the first time "communicated to him many circumstances respecting a connection, he stated he had had, with a Miss Johanna Gordon at Edinburgh, and expressed his fears that she would be writing and troubling his father upon that subject, as well as tormenting him the said Joan William Henry Dalrymple with letters, to avoid which, he begged him not to forward any of her letters to him who was then about to go to the Continent, and in order to enable him to know her handwriting, and to distinguish her letters from any others, he then cut off the superscription from one of her letters to him, which he then gave to the deponent for that purpose, and at the same time swore, that if he did forward any of her letters, he never would read them; and he also desired and entreated him to prevent any of Miss Gordon's letters from falling into the hands of General Dalrymple, and that he went off again to the Continent in the month of September." Mr Hawkins

further says, "that he did find means to prevent several of Miss Gordon's letters, addressed to General Dalrymple, from being received by him, but having found considerable risk and difficulty therein, and in order to put a stop to her writing any more letters to General Dalrymple, he the deponent did himself write and address a letter to her at Edinburgh, wherein he stated that the letters, which she had sent to General Dalrymple, had fallen into his hands to peruse or to answer, as the General was himself precluded from taking any notice of letters, from the precarious state he was in, or to that effect, and urged the propriety of her desisting from sending any more letters to General Dalrymple; and the deponent having, in his said letter, mentioned that he was in the confidence of, and in correspondence with Mr Dalrymple, she soon afterwards commenced a correspondence with him respecting Mr Dalrymple, and also sent many letters, addressed to Mr Dalrymple, to him, in order to get them forwarded; but the deponent having been particularly desired by Mr Dalrymple not to forward any such letters to him, did not send all, but thinks he did send one or two, in consequence of her continued importunities;" he says, "that it was some time in the latter end of the year 1806, or the beginning of the year 1807, that the correspondence between Miss Gordon and himself first commenced; and that after the death of General Dalrymple, which he believes happened in or about the spring of the year 1807, she, in her correspondence with him, expressly asserted and declared to him her marriage with Mr Dalrymple."

It appears, then, that Miss Gordon knew nothing of Mr Hawkins, except from the account he had given of himself, that he was the confidential agent of Mr Dalrymple, and therefore she might naturally have felt some hesitation about laying the whole of her case before him, especially as General Dalrymple was alive, till whose death the marriage was to remain a profound secret; but upon that event taking place, which happened at no great distance of time, Miss Gordon instantly asserted to Mr Hawkins her marriage with Mr Dalrymple, and he, wishing to be furnished with the particulars, wrote to her for the purpose of obtaining them, which she thereupon communicated, and at the same time sent him a copy of the original papers, which, in the language of the law of Scotland, she called her *marriage lines*. She mentioned likewise some bills which had been left unpaid by her asserted husband, upon which he wrote to Mr Dalrymple, and he says, "that he has no doubt Mr Dalrymple received the letters, because he replied thereto from Berlin or Vienna, and caused the bills to be regularly discharged." He says, "that in the latter end of May, in the year 1808, Mr Dalrymple returned again to England." I ought to have mentioned that it appears clearly, that Miss Gordon had been sending letters to Mr Hawkins, expressive of her uneasiness on account of the reports which had prevailed of a marriage about to be entered into by Mr Dalrymple. She says, in a letter to Mr Hawkins, "I shall have no hesitation in putting my papers into the hands of a man of business, and establishing my rights,

as it is a very unpleasant thing to hear different reports every day; the last one is, that Mr Dalrymple had ordered a new carriage on his marriage with a nobleman's daughter."

This description cannot apply to the marriage which has since taken place with Miss Manners, but is merely some vague report which it seems had got into common discourse and circulation. On the 9th of May, she writes to know whether any accounts had been received from Mr Dalrymple, and says, "any real friend of Mr Dalrymple's ought to caution him against forming any new engagement;" and she protests most strongly against his entering into a matrimonial connection with another woman.—In the end of that very month of May, Mr Dalrymple came home, having been at different places on the Continent; he went down to Mr Hawkins' house at Findon, where having met him, they conversed together upon Mr Dalrymple's affairs, and particularly upon his marriage with Miss Gordon, and on that occasion Mr Hawkins having at this time no doubt left upon his mind of the marriage, and fearing from the manner and conduct of Mr Dalrymple, that he had it in contemplation to marry Miss Manners, the sister of the Duchess of St Albans, he cautioned him in the most anxious manner against taking such a step, and in the strongest language which he was able to express, described the mischiefs which would result from such a measure both to himself and the lady, and the difficulties in which their respective families might be involved, owing to Mr Dalrymple's previous marriage.

Mr Hawkins thought, at the time, that those admonitions had had the good effect of deterring him from the intention of marrying Miss Manners, though he mentions a circumstance which bears a very different complexion, viz. that Mr Dalrymple took from him, almost by force, some of Miss Gordon's letters, and particularly those annexed to the allegation. He says, " that Mr Dalrymple took them under pretence of shewing them to Lord Stair, and seemed by his manner and expressions to consider that he had thereby possessed himself of the means of shewing that Johanna Dalrymple was not his wife." It was about the end of the month of May, that Mr Hawkins and Mr Dalrymple held this conversation at Findon, and, upon the 2d of the following month, Mr Dalrymple was married to Miss Manners, before it was possible that Miss Gordon could know the fact of his arrival in England. Upon her knowledge of the marriage, she immediately proceeds to call in the aid of the law.—I profess I do not see what a woman could with propriety have done more to establish her marriage rights; Mr Dalrymple was all the time abroad, and the place of his residence perfectly unknown to her; no process could operate upon him from the Courts, either of Scotland or England, nor was he amenable in any manner whatever to the laws of either country.

She did all she could do under the obligations of secrecy, which he had imposed upon her, by entering her private protest against his forming any new connection; she appears to me to have satisfied the whole

demands of that duty, which such circumstances imposed upon her; and I must say, that if an innocent lady has been betrayed into a marriage, which conveys to her neither the character nor rights of a wife, I cannot, upon any evidence which has been produced, think that the conduct of Miss Gordon is chargeable, either legally or morally, with having contributed to so disastrous an event.

Little now remains for me, but to pronounce the formal sentence of the Court, and it is impossible to conceal from my own observation the distress which that sentence may eventually inflict upon one, or perhaps more individuals; but the Court must discharge its public duty, however painful to the feelings of others, and possibly to its own; and I think I discharge that duty in pronouncing, that Miss Gordon is the legal wife of John William Henry Dalrymple, Esq., and that he, in obedience to the law, is bound to receive her home in that character, and to treat her with conjugal affection, and to certify to this Court that he has so done, by the first Session of the next Term. *

* From this decree an appeal was alleged and prosecuted to the Court of Arches. In the course of those proceedings an intervention was given for Laura Dalrymple—described as wife of John William Henry Dalrymple, Esq., the Appellant in the cause. On the 3d Session of Mich. Term, viz. 18th of November 1811, an allegation was asserted on her behalf, and the Judge assigned to hear, on the admission thereof, on the by-day. On that day, viz. 4th of December, her Proctor prayed the assignation to be continued, which was opposed; and the Judge concluded the cause, and assigned the same for sentence on the next court day. On the first Sess. Hil. Ter. viz. January 1812, her Proctor alleged the cause to

have been appealed: and the appeal was accordingly prosecuted to the High Court of Delegates, where the grievance complained of was, "that the Judge of the Court of Arches had rejected the prayer of the said Laura Dalrymple, *for time* to be allowed for the admission of an allegation on her behalf." Time was allowed by the Court of Delegates.—And the cause being there retained, her allegation was given in, and opposed, and ultimately rejected. The cause was afterwards heard upon the merits; and, on the 19th of January 1814, the sentence of the Consistory Court was affirmed.

APPENDIX.

EXHIBITS.

No. I.

(Endorsed) "A sacreed promise."

I DO hereby promise to marry you as soon as it is in my power, and never marry another.

J. DALRYMPLE.

And I promise the same,

J. GORDON.

No. II.

I HEREBY declare that Johanna Gordon is my lawful wife J. DALRYMPLE.

May 28. 1804

AND I hereby acknowledge John Dalrymple as my lawful husband. J. GORDON.

No. X.

I HEREBY declare Johanna Gordon to be my lawful wife, and as such I shall acknowledge her the moment I have it in my power. J. W. DALRYMPLE.

July 11. 1804.—Edinbro'.

I hereby promise that nothing but the greatest necessity (necessity which —— situation alone can justify) shall ever force me to declare this marriage.

J. GORDON.

(now) J. DALRYMPLE.

July 11. 1804.

Witness, Charlotte Gordon.

No. XI.

"Sacreed promises an engagements."

"J. D." "J. G."

WITNESSES EXAMINED ON BEHALF OF Miss JOHANNA GORDON.

Examined on the Libel in London.

Dame Charlotte Johnstone, wife of Sir John Lowther Johnstone, Baronet.
Samuel Hawkins.
Alexander Bryant.
Duke of Gordon.

Examined on the Law, by Requisition at Edinburgh.

Honourable Henry Erskine.
Robert Craigie, (Lord Craigie).
Robert Hamilton.
David Hume (now Baron).
Robert Hodshon Cay.
Andrew Ramsay.

Grizel Lyall,
Peter M'Cutcheon,
William Robertson,
Alexander Porteous,
Archibald Lock,
Walter Davidson,
James Roy.

} Servants in the Family of Charles Gordon, Esq.

Examined on the Allegation in London.

Samuel Hawkins.
Sir Rupert George, Baronet.

At Edinburgh.

James Roy.
John Laing.

WITNESSES ON BEHALF OF JOHN WM. HENRY DALRYMPLE, ESQ. (NOW EARL OF STAIR.)

Examined on the Allegation in London.

Henry Perrenne.
Richard Foalman North.
Adam Ormsby.
Henry Brown.
Wm. Brother Chadwell.
George Robinson.
George Wyndham.
Charles Calchmayd Morgan.
Charles Johnson.

Examined on the Law, by Requisition at Edinburgh.

James Robertson.
James Roy.
David Wardlaw.
John Clerk (late Lord Eldin).
David Cathcart (late Lord Alloway).
Adam Gillies (now Lord Gillies.)

Examined by request at Glasgow.

Sir Islay Campbell, Bart. President of the Court of Session.

JUDGMENT

PRONOUNCED IN THE

HIGH COURT OF ADMIRALTY.

IN THE CASES OF

THE MARIA,—PAULSEN, *Master.*

THE GRATITUDINE,—MAZZOLA, *Master*

BY

THE RIGHT HON. SIR WILLIAM SCOTT.

EDINBURGH:
THOMAS CLARK, LAW-BOOKSELLER.
MDCCCXXXVI.

PREFACE.

It may be justly said of Lord Stowell, better known in this country as Sir William Scott, in the language of Cicero, that he was *jurisperitorum eloquentissimus*. This great man presided in the High Court of Admiralty since 1798, and during that period commanded the admiration of all Europe by the learning, acuteness, and finished eloquence of his judgments.

In prize law he everywhere exhibits the most profound and accurate knowledge of all the public acts of Continental Europe, and also as a maritime judge, deciding, in what is called the Instance Court, the great principles of commercial jurisprudence. His superiority in this department, over the technical reasoning of the common lawyers, is most signal.

He discusses every question with a persuasive and comprehensive liberality, with a tone of general equity, a knowledge of maritime usages, and a disposition to consider maritime jurisprudence as the unwritten law of the world, rather than the municipal monopoly of a single nation; and he draws from all sources, ancient and modern, the best and purest principles to aid, to illustrate, and to confirm his own judgment. With him the grave learning of Grotius, the acute, bold, and somewhat vehement discussions of Bynkershoek, the reverend testimonies of the Consolato del Mare, the collections of Cleirac,

the busy, practical sense of Roccus, the brief but clear sense of Heineccius, the various and exhausting labours of Cesaregis, the argumentative commentaries and luminous treatises of the French jurists, appear as perfectly familiar as the writers of his own age and country. He evidently reposes on them, even when he does not cite them; and transfuses into his own eloquent and impressive judgments, whatever they afford of general doctrine, or just interpretation, upon all the doubtful questions of maritime law.

One scarcely knows which most to admire, the simplicity of his principles, the classical beauty of his diction, the calm and dispassionate spirit of his inquiries, his critical but candid estimate of evidence, his strong love of equity, his deep indignation against fraud, chastened by habitual moderation, or that pervading common sense, which looks into, and feels and acts upon the business of life with a discriminating but indulgent eye, content to administer practical good without ostentation, and wasting nothing upon speculations, whose origin is enthusiasm, and whose end is uncertainty or mischief. Even when he deals with subjects of another class, as in ecclesiastical causes in the Consistory Court, one is surprised to see with what admirable propriety he uses his knowledge of general jurisprudence and the civil law, to give vigour to his decrees. And upon questions involving the *lex loci*, he has triumphantly shown, that he can master the results of foreign jurisprudence, and, as in the very interesting case of *Dalrymple* v. *Dalrymple* (which forms the fourth number of this Collection of Scarce and Celebrated Tracts), compose the strifes of the learned advocates of the Scottish bar, and fix for ever upon an immovable basis a question which had vexed the domestic forum of Scotland for a long period with its doubts and

difficulties. We say, without hesitation, that the character of this eminent judge, whatever may have been his original genius and ability, owed its elevation, in a great measure, to his enlarged studies, and his cultivation of universal jurisprudence. Take, for instance, his celebrated judgment in the case of the *Gratitudine*, in 1801, which forms a portion of the present number, on the right of the master to hypothecate the cargo, as well as the ship and freight, for the necessities of the voyage, or the case of the Julianna in 1822, on the invalidity of a stipulation in the shipping-paper, to cut off the seamen from wages, unless the voyage should be performed to the final port of destination; where shall we find in the annals of the common law, except in the judgments of Lord Mansfield, cases argued out upon such rational and enlightened principles, aided by sober and various learning, and ending in conclusions so irresistible? one seems in them to be reading not the law of England merely, but the law of the world—the results of human reason and human learning, acting on human concerns, with reference to principles absolutely universal in their justice and convenience of application.

These selections will accomplish an important end, if they shall be the means of directing the attention of law students to the entire series of the judgments of this eminent judge, and inciting them to the study of those fine models which he has left on record, with a diligence proportionate to their importance and utility.

EDINBURGH, 38. GEORGE STREET,
1*st October* 1836.

CASES

DETERMINED IN THE

HIGH COURT OF ADMIRALTY.

THE MARIA, PAULSEN Master.

A vessel sailing under convoy of an armed ship for the purpose of resisting visitation and search, condemned.—Decided 11th June 1799.

THIS was the leading case of a fleet of Swedish merchantmen, carrying pitch, tar, hemp, deals, and iron, to several ports of France, Portugal, and the Mediterranean; and taken January 1798, sailing under convoy of a ship of war; and proceeded against for resistance of visitation and search by British cruizers.

In December 1798, this case coming on to be argued on the original evidence, * the Court directed farther information by both parties, respecting the precise acts that took place at the time of capture—

* Of the very long and able discussion which this case underwent, it is the argument immediately preceding the judgment that the editor has principally ventured to abstract: on the former hearing many topics of a more general nature were strongly urged on

the instructions under which the convoyed ships were sailing, and also the instructions to the Swedish frigate.

On a subsequent day this information being produced, it was again argued at much length.

On the part of the Captors, the King's Advocate and Arnold in *substance* contended,—If the case of this ship and cargo were to be considered singly, and separated from the principal question of convoy, there are many circumstances attending it of a very noxious aspect. It was going on an asserted destination to Genoa, at a time when that port was become almost a hostile port, by its subserviency to all the purposes of the French Marine, whilst our ships and cruizers were absolutely excluded. It was going under the *certificate* of the French consul, in compliance with the unjust *decree of the French government* *; and

the part of the claimants. As the substance of these and of the whole case is reduced to ten general positions, offered *as the reasons of an appeal* now depending, the editor is anxious to relieve himself from the responsibility of abstracting a very wide range of arguments *used at different hearings* on so important a subject, by referring the reader to the end of this case † for the statement of those reasons drawn up with great care and attention in the words of the parties themselves.

* Decree 18th January 1797.—" L'état des navires en ce qui concerne leur qualité de neutre ou d'ennemi sera déterminé par leur cargaison; en conséquence tout bâtiment trouvé en mer, chargé en tout ou en partie de marchandises provenant d'Angleterre, ou de ses possessions, sera déclaré de bonne prise, quelque soit le

† The original judgment was *confirmed* on appeal, but the ten general positions mentioned as being inserted at the end of the case have been unaccountably omitted in the original publication.

the articles of which the cargo consisted were articles of a contraband nature. It is true that they are such articles as the Swedes are now permitted to carry in time of war under certain circumstances, but only under a strict observance of good faith, a conduct perfectly neutral, and in all cases subject to a right of *preemption* on the part of a belligerent nation. And farther, the truth of this asserted destination to Genoa is exposed to great suspicion from the discretionary power with which the master was intrusted of going elsewhere.

These are circumstances unfavourable in themselves, but they assume a more distinct hostile character from the circumstance of being taken sailing under the protection of an armed force, and associated for the purpose of resisting visitation and search from the cruizers of this country. The act of resistance to the lawful rights of search is the ground on which it is principally contended that this case is subject to confiscation; for although this fact may receive colour and complexion of a more hostile nature from other circumstances, it is alone sufficient to incur the penalty of confiscation. The right of visitation and search in time of war, even in the most innoxious cases, is an established right of belligerent powers,

propriétaire de ces denrées ou marchandises."—See Atcheson's Report of a case in King's Bench, Appendix, page 155, where the reader will see the late regulations of the French government in matters of prize.

In consequence of this decree, all neutrals were required to take certificate from the French consuls that their goods were not of British produce or manufacture.

acknowledged and referred to in the treaties of the states of Europe. It is admitted by all speculative writers on the law of nations. Bynkershoek expressly admits it in these words: "Velim animadvertas, eatenus utique licitum esse amicam navem sistere, ut non ex fallaci forte aplustri; sed ex ipsis instrumentis in navi repertis, constet navem amicam esse." Lib. i. ch. 14. And Vattel, L. iii. sect. 114, acknowledges the penalty attending the contravention of this right by neutral ships to be confiscation. Even in cases where it is possible this right may be wrongfully exercised by cruizers, resistance is not the legal remedy, as there is a regular and effectual remedy provided by all the maritime codes of Europe, in the responsibility which cruizers lie under to make compensation for any injurious exercise of this right, in costs and damages. These principles being admitted, as they were indeed admitted in the former hearing, it becomes a question of fact, Whether there was that hostile resistance that will subject the parties to the penalty of confiscation? On this point it is submitted, that the instructions of the Swedish government to the commander of this convoy * lay upon him as a positive

* Instructions to the commander:

"In case the Lieutenant-Colonel should meet with any ships of war of other nations, one or more of any fleet whatever, then the Lieutenant-Colonel is to treat them with all possible friendship, and not give any occasion of enmity; but if you meet with any foreign armed vessel, which, on speaking, should be desirous of having still farther assurance that your frigate belongs to the King of Sweden, then the Lieutenant-Colonel is, by the Swedish flag and salute, to make them know that it is so; or if they would make any search among the merchant ships which are under your con-

injunction to prevent search by all possible means, and that "violence must be opposed by violence." These are carried into execution by the sailing orders, * which forbad their merchantmen "to submit to search; but if any boat attempted to come alongside, to sheer off from them." It is still farther carried into effect by all that passed at the time; and more especially by the act of forcibly removing an officer who had taken possession of one ship, and carrying him on board the frigate: and it is again confirmed by the regret which the commander expressed that he had not fired, protesting, "that if the ships had not been seized at night he would have resisted."

For the Claimants, Laurence and Swabey.—The original importance of this question, great as it undoubtedly was, has been very materially increased by the manner in which it has been brought on.

The claimants have reason to complain that every thing has been brought forward *ex parte* by the cap-

voy, which ought to be endeavoured to be prevented as much as possible, then the Lieutenant-Colonel is, in case such thing should be insisted on, and that remonstrances could not be amicably made, and that, notwithstanding your amicable portment, the merchant ships shall be nevertheless violently attacked, then violence must be opposed against violence."

* Sailing instructions to the merchantmen:

"All merchantmen ships, during the time they are under convoy of his majesty's ships, frigates, or sloops, are forbidden to suffer the boats of any foreign nation to board them for the sake of visitation or searching; but in case such boats shew an intention to come alongside, the merchant-ships are to sheer off from them."

tors. The instructions of the Swedish commander are produced in an unauthenticated form, and introduced only under a note from the under-secretary of state. It is not proved that they were the whole of the instructions; it must therefore rest with the Court to say how far they are sufficiently authenticated. The instructions under which the English commander acted have been altogether withheld. On the part of the claimant's evidence, the officer of the Swedish frigate has been sent away to render an account to his own government, and by that means the parties are deprived of the benefit of his evidence. Under these disadvantages, however, it is still to be contended that there has been no act of hostility committed against this country. There is no disposition to assert a right on the part of neutral merchant ships to resist visitation and search by the cruizers of a belligerent state. It is not to be argued undoubtedly that neutrals have a right in all cases to resist search. If such a speculative doctrine is asserted by any states, it is for them to maintain it: In the present case we stand upon no such position, but upon something which appears to have been overlooked,—a treaty on this important question of search between the two countries: Treaty between England and Sweden, 1661, art. 12. After an express treaty, it is not allowable to *presume* any thing contrary to that compact on the part of the other state; nor to argue on general principles to defeat the force of the obligation arising from it on our parts. Search is by this treaty to be exercised only on a refusal to produce the certificates or ship's pa-

pers; in no other case is it justifiable: and although a strong suspicion might still justify a seizure under the responsibility of costs and damages, still, in the manner of making this seizure (and the whole of this case rests *on the course of the proceedings*), if we did not proceed in the manner in which we ought to have done, there is an end of our right under the compact; and we are not at liberty to impute any thing that ensued in consequence of our own irregularity, as an act of aggression against the other party. These are the principles on which it is intended to support the present claim. Originally, and in its natural appearance, this convoy is to be considered as a neutral convoy, and therefore it lies on the captor to shew by *some act* that there was a departure from neutrality; for it cannot be pretended that a mere intention (if it were proved) would be sufficient, under any system of law, to incur the penalty of an actual offence. It seemed to be admitted by the Court on a former day, that there was a just distinction to be made between two cases of convoy,—between a convoy of an enemy's force and a neutral convoy. The former would stamp a *primary* character of hostility on all ships sailing under its protection, and it would rest with the parties to take themselves out of the presumption raised against them. But that it would be, even in that case, nothing more than a presumption, as determined by a late case before the Lords;—the Sampson Barney, an asserted American armed ship sailing with French cruizers at the time they engaged some English ships, and communicating with the French

ships by signal for battle. In that case, although there had been a condemnation below, the Lords sent it to farther proof, to ascertain whether there had been an actual resistance.

[*Court.*—I do not admit the authority of that case to the extent you push it. That question is still reserved, although the Lords might wish to know as much of the facts as possible.]

In the other case of a neutral convoy there is no presumption of a hostile character arising from it, and therefore it remains with the captors to shew that there was an actual resistance in this case. Coming then to the question of fact, with the provisions of the treaty kept constantly in view, and remembering that when there is a treaty regulating the mode and manner of proceeding, both parties are bound to proceed accordingly, and that the presumptions also which are raised should proceed upon the words of that compact, and not depart from it; where will the captors find any actual resistance in the conduct of these parties?

The instructions are relied upon, but they are general, and do not, any more than the other circumstances preceding or attending this transaction, point in any degree to a resistance towards this country.—It is notorious, that at the time of passing the French decree against English merchandize, which is deservedly reprobated on all sides, the Swedish merchants did apply for a protection of this kind; and therefore the probability is, at least, as great that it was intended to protect them against French cruizers as against this country. The directions are, to ob-

serve an amicable deportment, but that violence must be opposed by violence; expressions on which it will not be fair to put any other construction than what is compatible with the provisions of the treaty, or to suppose that they meant more than that the stipulations of the treaty were to be faithfully maintained. What passed then at the time? Was there any thing like actual personal resistance? Certainly not. From the evidence of M'Dougal, it appears that there was nothing like an hostile appearance shewn towards the Wolverine, till after four days had passed in discussion between the commanders. The Swedish commander had a right to expect to have been first addressed; under the treaty the certificates should have been demanded; if not produced, the ships might have been searched; and, on strong suspicion, seizure might have been made. But the question is, Have the captors proceeded in this way? If, in opposition to this, they have at once superseded all forms, and said, *We seize and detain*, the matter assumes a different aspect, and we have no right to exact a rigid observance of form on the other side. On descrying the convoy, what was done on the part of the captors? It was on that side that the first appearance of menace was shewn —the English ships immediately beat to quarters— the destination is inquired of—and an answer given —but there is no demand for papers—no attempt to search. Captain Lawford states, that, as a measure of prudence, he sent immediately to the Admiralty for particular instruction, and received orders to detain the convoy. On the first interview, the Swedish

commander immediately communicated his instructions with the greatest readiness; from which it appears, that, in his opinion, they contained nothing hostile to this country. The removal of a petty officer, that has been relied on as an act of resistance, was more a matter of form than actual opposition, used as a sort of protest against the irregular proceeding of the captors, and did not for a moment retard the actual delivery of possession on the part of the merchantmen. The subsequent acts shew still more strongly how little the acts of the captors were directed by the treaty; and how little they themselves thought that any penalty of prize had accrued to them by this circumstance of convoy. Instead of the usual demand for the ship's papers *in the first instance*, they were not demanded till August. They were afterwards returned to one vessel, and an offer was made to all those bound to neutral ports to depart; but they, refusing to go without some compensation for detention, proceedings were then instituted, for the first time, on the principle of convoy,—a principle which cannot now come into discussion, owing to the irregular proceedings of the captors; and which, besides, cannot fairly be enforced against the merchantmen by this Court, whilst the Government has permitted the frigate to depart, and has declined to consider the act of the Commander as an act of hostility against the State. On these grounds, and adverting to former practice, in which some instances occur of restitution of ships taken under convey, whilst no precedents of condemnation on this principle are ad-

duced, it is submitted that the claimants have done nothing to forfeit their neutral character, and are therefore entitled to restitution.

JUDGMENT.

Sir W. Scott.—This ship was taken in the British Channel in company with several other Swedish vessels, sailing under convoy of a Swedish frigate, having cargoes of naval stores and other produce of Sweden on board, by a British squadron under the command of Commodore Lawford.

The facts attending the capture did not sufficiently appear to the Court upon the original evidence; it therefore directed further information to be supplied, and by both parties.

The additional information now brought in consists of several attestations made on the part of the captors, and of a copy of the instructions under which the Swedish frigate sailed, transmitted to the king's proctor from the office of the British Secretary of State for the Foreign Department. On the part of the Swedes some attestations and certificates have been introduced, but all of them applying to collateral matter, none relating immediately to the facts of the capture. ——On this evidence the Court has to determine this most important question; for its importance is very sensibly felt by the Court. I have therefore taken some time to weigh the matter maturely. I should regret much if that delay has produced any private inconvenience; but I am not conscious (attending to the numerous other weighty causes that

daily press upon the attention of the Court,) that I have interposed more time in forming my judgment than was fairly due to the importance of the question, and to the magnitude of the interests involved in it.

In forming that judgment, I trust that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me, namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral, and some to be belligerent. The seat of judicial authority is, indeed, locally *here*, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here, to determine this question exactly as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law on this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question; a question regarding one of the most important rights of belligerent nations relatively to neutrals.

The only special consideration which I shall notice in favour of Great Britain (and which I am entirely

desirous of allowing to Sweden in the same or similar circumstances) is, that the nature of the present war does give this country the rights of war, relatively to neutral states, in as large a measure as they have been regularly and legally exercised at any period of modern and civilized times. Whether I estimate the nature of the war justly I leave to the judgment of Europe, when I declare, that I consider this as a war in which neutral states themselves have an interest much more direct and substantial than they have in the ordinary, limited, and private quarrels (if I may so call them) of Great Britain and its great public enemy. That I have a right to advert to such considerations, provided it be done with sobriety and truth, cannot, I think, reasonably be doubted,—and if authority is required, I have authority—and not the less weighty in this question for being Swedish authority—I mean the opinion of that distinguished person, one of the most distinguished which that country (fertile as it has been of eminent men) has ever produced,—I mean Baron Puffendorff * : the passage to which I allude is to be found in a note of Barbeyrac's on his larger work, Lib. viii. c. 6, s. 8. Puffendorff had been consulted in the beginning of the present century, when England and other states were engaged in the confederacy against Louis XIV. by a lawyer upon the continent, Groningius, who was de-

* Puffendorff was not actually born in Sweden, but is usually claimed and allowed as a writer of that country, from his employment in it under the king of Sweden. The great work on which his fame is principally built, was given to the world during his residence in it.

sirous of supporting the claims of neutral commerce, in a treatise which he was then projecting. Puffendorff concludes his answer to him in these words:—

"I am not surprised that the northern powers should consult the general interests of all Europe, without regard to the complaints of some greedy merchants, who care not how things go, provided they can but satisfy their thirst of gain. Those princes wisely judge that it would not become them to take precipitate measures, whilst other nations are combining their whole force to reduce within bounds an insolent and exorbitant power which threatens Europe with slavery, and the protestant religion with destruction. This being the interest of the northern crowns themselves, it is neither just nor necessary that, for the present advantage, they should interrupt so salutary a design, especially as they are at no expense in the affair, and run no hazard."—In the opinion, then, of this wise and virtuous Swede, the nature and purpose of a war was not entirely to be omitted in the consideration of the warrantable exercise of its rights, relatively to neutral states. His words are memorable; I do not over-rate their importance when I pronounce them to be well entitled to the attention of his country.

It might likewise be improper for me to pass entirely without notice, as another preliminary observation, (though without meaning to lay any particular stress upon it,) that the transaction in question took place in the British Channel, close upon the British coast, a station over which the Crown of England has,

from pretty remote antiquity, always asserted something of that special jurisdiction which the sovereigns of other countries have claimed and exercised over certain parts of the seas adjoining to their coasts.

In considering the case, I think it will be advisable for me, first, to state the facts as they appear in the evidence; secondly, to lay down the principles of law which apply generally to such a state of facts; thirdly, to examine whether any special circumstances attended the transaction in any part of it, which ought in any manner or degree to affect the application of these principles.

The facts of the capture are to be learnt only from the captors; for, as I have observed, the claimants have been entirely silent about them, and that silence gives the strongest confirmation to the truth of the accounts delivered by the captors.

The attestation of Captain Lawford introduces and verifies his log-book, in which it is stated, that after the meeting of the fleets he sent an officer on board the frigate to inquire about the cargoes and destination of the merchantmen, and was answered, "that they were Swedes, bound to different ports in the Mediterranean, laden with hemp, iron, pitch, and tar." Upon doubts which Captain Lawford entertained respecting the conduct he should hold in a situation of some delicacy, he dispatched immediately a messenger to the Admiralty, keeping the convoy in his view; and having received orders from the Admiralty by the return of his messenger to detain these merchant ships, and carry them into the nearest English

Port, he sent Sir Charles Lindsay and Captain Raper to communicate them in the civilest terms to the Swedish commodore, who shewed his instructions to repel force by force if any attempt was made to board the convoy, and declared that he should defend them to the last. The crew of the Swedish frigate were immediately at quarters, matches lighted, and every preparation made for an obstinate resistance; and the signal was made on board the British Squadron to prepare for battle. In the night, possession was taken of most of the vessels, the Swedish frigate making many movements which were narrowly watched by the Romney, keeping close under his lee, lower deck guns run out, and every man at his quarters. In the morning the Swedish frigate hoisted out an armed boat, and sent on board one of the vessels which had been taken possession of, and took out by force the British officer who had been left on board, and carried him on board the frigate, where he was detained. The Swedish commander sent an officer of his own on board Captain Lawford to complain that he had taken advantage of the night to get possession of his convoy, which was unobserved by him, or he should assuredly have defended them to the last. Upon further conference and representation of the impracticability of resistance to such a superior force, he at length agreed to go into Margate Roads, and returned the British officer who had been taken out and detained on board the frigate. After the arrival in Margate Roads, he lamented that he had not exchanged broadsides; said that he did not consider his convoy as de-

tained, and should resist any further attempt to take possession of them.

Captain Raper states, that on going on board the Swedish frigate he found all the men at their quarters, and the ship clear for action; that the commodore shewed his orders, and expressed his firm determination to carry them into execution. Captain Lawford sent a boat with an officer on board several of the convoy, to desire they would follow into Margate Roads; their answer was, they would obey no one but their own commodore.

Lieutenant M'Dougal describes in like terms the menacing appearance and motions of the Swedish frigate. He was sent to take possession of vessels which would not bring-to without firing at them. On his going on board one of them, the master declared that he had orders from his commodore not to give up the possession of her to any person whatever, and repeatedly drove away by force the British mariner, who, by his order, took possession of the helm.

Mr Cokcraft is another witness to the same effect, and Mr Candish, the officer who was taken by force out of the Swedish merchantman. Expressions of strong reproach against the proceedings of the English were addressed to him, and the commodore protested, that if he had not been surprised he would have defended his convoy to the last.

What, then, do these attestations (uncontradicted attestations) prove? To my apprehension, they prove most clearly these facts,—That a large number of vessels, connected altogether with each other, and

with a frigate which conveyed them, being bound to different ports in the Mediterranean, some declared to be enemy's ports and others not, with cargoes consisting, amongst other things, of naval stores, were met with close upon the British coast, by his Britannic Majesty's cruizers,—that a continued resistance was given by the frigate to the act of boarding any of these vessels by the British cruizers, and that extreme violence was threatened in order to prevent it; and that the violence was prevented from proceeding to extremities only by the superior British force which overawed it,—that the act being effected in the night, by the prudence of the British commander, the purpose of hostile resistance, so far from being disavowed, was maintained to the last, and complaint made that it had been eluded by a stratagem of the night, —that a forcible recapture of one vessel took place, and a forcible capture and detention of one British officer who was on board her, and who, as I understand the evidence, was not released till the superiority of the British force had awed this Swedish frigate into something of a stipulated submission.

So far go the general facts. But all this, it is said, might be the ignorance or perverseness of the Swedish officer of the frigate—the folly or the fault of the individual alone. This suggestion is contradicted by Mr Raper's log, which proves that the merchantman refused to admit the British officers on board, and declared that they would obey nobody but their own commodore; a fact to which Mr M'Dougal likewise bears testimony. It is contradicted still more forcibly

by the two sets of instructions, those belonging to the frigate and those belonging to the merchant vessels. The latter have been brought into court by themselves, and of the authenticity of the former there is no reasonable doubt, for they are transmitted to me upon the faith of one of the great public offices of the British government, and no person disavows them, and indeed nobody can disavow them, because they were produced by the Swedish captain, who made no secret whatever of their contents. Something of a complaint has been indulged, that the orders from the British Admiralty have not been produced; a singular complaint, considering that they were never called for by the claimants, and they were not ordered by the Court; because if the act of the captors was illegal, the orders of the Admiralty would not justify it; and the want of orders would not vitiate if the act was legal. No mystery, however, was made about these, for the communication of orders and instructions was mutual and unreserved. It is said that the instructions to the frigate are intended only against cruizers of Tripoli, and an affidavit has been brought in to shew that that government had begun hostilities against the Swedes. The language, however, of these instructions is as universal as language possibly can be, it is pointed against the "fleets of any nation whatever." It is, however, said that this was merely to avoid giving offence to the Tripoline government. But is the Tripoline government the only government whose delicacy is to be consulted in such matters? Are terms to be used alarming to every other state,

merely to save appearances with a government which, they allege in the affidavit referred to, had already engaged in unjust hostility against them? There is, however, no necessity for me to notice this suggestion very particularly, and for this plain reason, that it is merely a suggestion neither proved nor attempted to be proved in any manner whatever; and the *res gesta* completely proves the fact to be otherwise, because it is clear that if it had been so, the commander of the frigate must have had most explicit instructions to that effect. They could never have put such general instructions on board, meaning that they should be limited in their application to one particular State, without accompanying them with an explanation either verbal or written, which it was impossible for him to misunderstand. Such explanation was the master-key which they must have provided for his private use: whereas nothing can be more certain than that he had been left without any such restrictive instructions; he therefore acts, as any other man would do, upon the natural sense and meaning of the only instructions he had received. On this part of the case, therefore, the question is, What is it that these general instructions purport?

The terms of the instructions are these,—they are incapable of being misunderstood: "In case the commander should meet with any ships of war of other nations, one or more of any fleet whatever, then the commander is to treat them with all possible friendship, and not to give any occasion of enmity; but if you meet with a foreign armed vessel which should

be desirous of having further assurance that your frigate belongs to the king of Sweden, then the commander is, by the Swedish flag and salute, to make known that it is so; or if they would make any search amongst the merchant vessels under your convoy, which ought to be endeavoured to be prevented as much as possible, then the commander is, in case such thing should be insisted upon, and that remonstrances could not be amicably made, and that notwithstanding your amicable comportment the merchant-ships should nevertheless be violently attacked, then violence must be opposed against violence." Removing mere civility of expression, what is the real import of these instructions? Neither more nor less than this, according to my apprehension: "If you meet with the cruizers of the belligerent states, and they express an intention of visiting and searching the merchant-ships, you are to *talk* them out of their purpose if you can; and if you can't, you are to *fight* them out of it." That is the plain English, and, I presume, the plain Swedish of the matter.

Were these instructions confined to the frigate, or were they accepted and acted upon by the merchantmen? That they were acted upon is already shewn in the affidavits which I have stated; that they were deliberately accepted appears from their own instructions, which exactly tally with them. These instructions declare in express terms, "that all merchant-ships, during the time they are under convoy of his Majesty's ships, are earnestly forbidden to suffer the boats of any foreign nation to board them for the

sake of visitation or searching; but in case such boats shew an intention of coming alongside, the merchant-ships are to sheer from them." It appears from the attestation that the obedience of these merchantmen outran the letter of their instructions.

Whatever then was done upon this occasion was not done by the unadvised rashness of one individual, but it was an instructed and premeditated act,—an act common to all the parties concerned in it; and of which every part belongs to all; and for which all the parties, being associated with one common intent, are legally and equitably answerable.

This being the *actual* state of the fact, it is proper for me to examine, secondly, what is their legal state, or, in other words, to what considerations they are justly subject according to the law of nations; for which purpose I state a few principles of that system of law which I take to be incontrovertible.

1st, That the right of visiting and searching merchant-ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destination, is an incontestible right of the lawfully commissioned cruizers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the legality of maritime capture; because if you are not at liberty

to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that *free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice ; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force,—something in the nature of civil process, where force is employed, but a lawful force which cannot lawfully be resisted. For it is a wild conceit that wherever force is used it may be forcibly resisted ; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature is in the state of war and conflict between two countries, where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly coexist.

2dly, That the authority of the Sovereign of the neutral country, being interposed in any manner of mere force, cannot *legally* vary the rights of a lawfully-commissioned belligerent cruizer; I say *legally*, because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity or of national policy, are views of the matter which, sitting in this Court, I have no right to entertain. All that I assert is, that *legally* it cannot be maintained, that if a Swedish commissioned cruizer, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the King of England being neutral to Sweden, is authorised by that law to obstruct the exercise of that right with respect to the merchant-ships of his country. I add this, that I cannot but think that if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegal violence to legal right. Two sovereigns may unquestionably agree, if they think fit, (as in some late instances they have agreed, *) by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can

* It is made an article of treaty between America and Holland, an. 1782; article 10. Mart. Tr. vol. ii. p. 255.

legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it. I am not ignorant, that among the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, have thrown upon the world, it has been within these few years advanced, or rather insinuated, that it might possibly be well if such a security were accepted. Upon such unauthorized speculations it is not necessary for me to descant: the law and practice of nations (I include particularly the practice of Sweden when it happens to be belligerent) give them no sort of countenance; and until that law and practice are new-modelled in such a *way* as may surrender the known and ancient rights of some nations to the present convenience of other nations, (which nations may perhaps REMEMBER to *forget* them when they happen to be themselves belligerent,) no reverence is due to them; they are the elements of that system which, if it is consistent, has for its real purpose an entire abolition of capture in war,—that is, in other words, to change the nature of hostility, as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way

which, professing gravely to adhere to that system which has for centuries prevailed among civilized states, and urging at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expense of the constant hazard of the harmony of states, and of the lives and safety of innocent individuals.

3dly, That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. For the proof of this I need only refer to Vattel, one of the most correct, and certainly not the least indulgent, of modern professors of public law. In Book III. c. vii. sect. 114, he expresses himself thus: "On ne peut empecher le transport des effets de contrebande, si l'on ne visite pas les vaisseaux neutres que l'on recontre en mer. On est donc en droit de les visiter. Quelques nations puissantes ont refusé en différents tems de se soumettre à cette visite; *aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se feroit condamner par cela seul, comme etant de bonne prise.*" Vattel is here to be considered not as a lawyer merely delivering an opinion, but as a witness asserting the fact,—the fact that such is the existing practice of modern Europe. And to be sure, the only marvel in the case is, that he should mention it as a law merely modern, when it is remembered that it is a principle not only of the civil law, (on which great part of the law of nations is founded,) but of the private jurisprudence of most countries in Europe,—

that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle, we find in the celebrated French Ordinance of 1681, now in force, Article 12, "*That every vessel shall be good prize in case of resistance and combat;*" and Valin, in his smaller Commentary, p. 81, says expressly, that although the expression is in the conjunctive, yet that the *resistance alone is sufficient* *. He refers to the Spanish Ordinance 1718, evidently copied from it, in which it is expressed in the disjunctive, "*in case of resistance or combat.*" And recent instances are at hand and within view, in which it appears that Spain continues to act upon this principle. The first time in which it occurs to my notice on the inquiries I have been able to make in the Institutes of our own country respecting matters of this nature, excepting what occurs in the Black Book of the Admiralty †, is in the Order

* In some of the treaties of France this article is expressly inserted in the disjunctive. Tr. between France and the Dutchy of Mecklenburg, art. 18, an. 1779. Mart. Tr. vol. ii. p. 40; also between France and Hamburgh, an. 1769.

† "B. 7. Item, se aucune nef ou vessel de la ditte flotte a congie et pouvoir de l'admiral de passer hors de la flotte entour aucun message ou autre besongne, s'ilz encontrent ou trouvent aucuns vesseaulx estranges sur la mer ou en ports des ennemys, adonques ceulx de nostre flotte doivent demander des maistres et gouverneurs de telz vesseaulx estrangers dont ilz sont et eulx bien examiner de leur charge ensemblement avecques leurs muniments et endentures, et s'il est trouve aucune chose de suspicion en telz vesseaulx que les biens sont aux ennemys, qui sont trouvez dedens les dits vesseaulx avec leurs maistres et gouverneurs ensemblement avecques les biens dedens icelle estants sauvement seront amenees devant l'admiral, et illecques s'il est trouvé qu'ilz sont loyaulx marchants et amys sans suspicion de colerer, les biens seront à eulx

of Council 1664, Article 12*, which directs, "That when any ship met withall by the Royal Navy or other ship commissionated, shall fight or make resist-

redelivrees sans eulx rien dommager, autrement seront pris avec leurs biens et raensonnez comme la loy de mer veult et demande.

"B. 8: Se aucunes de noz nefs ou vesseaulx encontrent sur la mer ou en ports aucuns autres vesseaulx, qui facent rebelletees ou defense encontre ceulx de noz nefs ou vesseaulx, adoncques bien lise à noz gents les autres comme ennemys assaillir et par forte mayn les prendre et amener entierement, comme ilz les ont gaignez, devant l'admiral sans eulx piller ou endommager, illecques de prendre ce que loy et coustume de mer veult et demande," &c.

* During the struggle for naval superiority, which took place between the maritime states of Europe about the middle of the seventeenth century, the pretensions of resisting search by the protection of convoy, was put forward with much caution, and apparently for the first time, by Christina queen of Sweden, August 16. 1653 Article 4th, "They shall in all possible ways decline that they, or any of those that belong to them, be searched. For seeing they are only sent to prevent all inconvenience and clandestine dealings, it is expected that they may be believed, and suffered to pass and proceed on their course unmolested, with all such things as are under their care." It was restrained to neutral ports.—Article 6th, "And more especially, for certain reasons, it is our command, that our own men of war *do chiefly, and in the beginning*, steer their course to such *ports as are neutral* in the English and Dutch war, till we give any farther directions on that account. However, without any hinderance to our own subjects that intend to carry on their own free trade to England and Holland *without* convoy."—Thurloe's *State Papers*, vol. i. p. 424.

In 1655 it was taken up by Holland: "They have a design to hinder the Protector all visitation and search, and this by very strong and sufficient convoy; and by this means they will draw all trade to themselves and their ships."—*Ibid.* vol. iv. p. 203.

In May 1656 there happened an actual rencounter on this subject between a fleet of merchantmen from Cadiz, (Spain being then at war with England,) under the convoy of De Ruyter, with seven men of war, and the commodore of some English frigates. "*Antwerp:* We have certain news of the arrival of De Ruyter in Zealand from Cadiz, from whence he brought stores of plate, mostly belonging to

ance, the said ship and goods shall be adjudged lawful prize." A similar article occurs in the proclamation of 1672. I am aware that in those orders and

merchants of this city; he was met withal at sea by some English frigates, but finding themselves too weak they let him go."—*Ib.* vol. iv. p. 740. See also the particular account of what passed, given by a Dutch officer to the States-General: "That upon de Ruyter declaring that there was not any thing on board belonging to the king of Spain, they parted."—*Ib.* vol. iv. 730. It appears, however, that the arrival occasioned great triumph in Holland and Flanders, and that the fleet was deeply laden with silver for the king of Spain, and the service of his armies in Flanders. "De Ruyter had brought in his own ship, and others in his fleet, the sum of 20,000,000 (perhaps rials) of gold and silver, the greatest part for the king of Spain's use, and the merchants of Brabant and Flanders."—*Ib.* vol. iv. p. 748, 732. The 12th article of the Engl. Ord. of 1664 might perhaps be pointed against these pretensions.

In another letter in the same collection, 21st September 1657, from Nieuport, the Dutch Ambassador in England, we find the subject of convey was strongly pressed at that time, and resisted on the part of this country: "Respecting secret articles," concerning the visitation of ships which are convoyed under the flag of the state, I acquainted their Lordships, that of old all kings and states had made a difference between particular ships sailing upon their risks and adventures, and between ships of the state and those which pass the sea under their flag and protection. That their High and Mighty Lords were of an opinion that it does strengthen the security of this state, that the ships of the state and officers should be responsible, as it were, for the ships sailing under their convoy; and that which I had proposed in my last memorandum concerning the same on behalf of their High and Mighty Lords was no new thing, but that plan had been most commonly proposed on all the treaties since the year 1651, in that manner, that without regulating the same according to the said articles, the troubles at sea, whereof I had so often complained, could not be removed and prevented, and I alleged several examples. Upon which now one then the other of the said three Lords * replied, and did very much insist, that it could not consist with their security; that they could not nor *ought* to trust so much to particular captains at sea; that it would be an introduction and encouragement to disaffected

* Thurloe, Wolsely, Jones.

proclamations are to be found some articles not very consistent with the law of nations as understood now, or indeed at that time, for they are expressly censured by Lord Clarendon *. But the article I refer to is not of those he reprehends; and it is observable that

persons to assist the enemy, and urged especially that in no former treaties any such articles were found, and that their High and Mighty Lords had no reason to desire now any such novelty. I said that the practice on this side in regard of searching and visiting ships without difference was a new thing, and that the inhabitants of the United Netherlands, feeling the trouble and inconveniency of it, had reason to insist that it may be rectified by a good regulation." Vol. vi. p. 511. See also for the former conference vol. v. p. 663.

It appears that so many objections had arisen on the treaty proposed on the part of Holland, that it was found necessary to form an entirely new projet. Vol. vi. p. 523–558.

In a subsequent letter from the Hague, 30th November 1657, it appears that the treaty broke off on this difference: "Le Sieur Nieuport n'est pas encore ici arrivé, mais il escrit aussi d'avoir prins son congé. Il est fort croyable qu'il ne sera guère contant d'avoir failli à achever le traitée de la marine; néanmoins, je m'imagine que la Hollande à present ne seroit pas fort marry de ne l'avoir pas achevé, pour ne se pas oster la liberté de visiter des mêmes en cette guerre contre Portugal." Thurloe's State Papers, vol. vi. p. 622.

On the subject of search generally, without *any expressed reference* to convoy, there is this letter from Cromwell to General Montague: "The secretary hath communicated to us your letter of the 28th, by which you acquaint him with the directions you have given for the searching of a Flushing and other Dutch ships, which (as you are informed) have bullion and other goods aboard them belonging to the Spaniard, the declared enemy of this state. There is no question to be made but what you have directed therein is agreeable both to the laws of nations and the particular treaties which are between this commonwealth and the United Provinces, and therefore we desire you to continue the said direction, and to require the captains to be careful in doing their duty therein.—*Hampton Court, 30th August* 1657."

* Lord Clarendon's Life, p. 242.

Sir Robert Wiseman, then the King's Advocate-General, who reported upon the articles in 1673, and expresses a disapprobation of some of them as harsh and novel, does not mark this article with any observation of censure. I am therefore warranted in saying, that it was the rule, and the undisputed rule, of the British Admiralty. I will not say that that rule may not have been broken in upon in some instances by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them, for no man can deny that a state may recede from its extreme rights, and that its supreme councils are authorised to determine in what cases it may be fit to do so, the particular captor having in no case any other right and title than what the state itself would possess under the same facts of capture. But I stand with confidence upon all fair principles of reason,—upon the distinct authority of Vattel,—upon the Institutes of other great maritime countries, as well as those of our own country,—when I venture to lay it down, that by the law of nations, as now understood, a deliberate and continued resistance to search on the part of a neutral vessel to a lawful cruizer is followed by the legal consequence of confiscation.

3. The third proposed inquiry was, Whether any special circumstance preceded, accompanied, or followed the transaction, which ought in any manner or degree to affect the application of the general principles?

The first ground of exemption stated on the part

of the claimants is the treaty with Sweden 1661, article 12, and it was insisted by Dr Laurence that although the belligerent country is authorised by the treaty to exercise rights of inquiry in the first instance, yet that these rights were not exercised in the manner therein prescribed. It is an obvious answer to that observation, that this treaty never had in its contemplation the extraordinary case of an armed vessel sent in company with merchantmen for the very purpose of beating off all inquiry and search. On the contrary, it supposes an inquiry for certain papers, and if they are not exhibited, or "*there is any other just and strong cause of suspicion,*" then the ship is to undergo search *. The treaty, therefore,

* It is said by Secretary Thurloe, in his conference with the Dutch ambassador, December 1656, "that the point of passes was very considerable to the state, and that the same was never agreed to in any treaty with any nation, but lately to Sweden."—Th. State Pap. vol. v. p. 663. This seems to fix the date of their introduction in prize matters.

A similar reference to the certificate of foreign magistrates with the same primary but inconclusive credit ascribed to them, appears to have been established in Denmark by Frederick II. in 1583, as a custom-house regulation respecting the customs and Sund duties payable by foreign merchants. Speaking of abuses, "We, not minding any longer to suffer the same, do therefore will, that henceforth every man which uses his trade of merchandise and navigation through our custom towns and streams do cause a certain and just brief of all the laden merchandises and goods to be comprehended in the certificates which he is to take under the seal of *his magistrate, and deliver* the same to our customers, with this warning, that if any man arrive there without such true and just certificate, and any hinderance and inconvenience do happen unto him in that respect, the ship being searched, that then he impute the same unto himself and not unto us or ours; and if, *upon cause of suspicion, the ships should be searched*, notwithstanding that a particular cer-

recognises the rights of inquiry and search, and the violation of those rights is not less a violation of the treaty than it is of the general law of nations. It is said that the demand ought first to have been made upon the frigate: I know of no other rule but that of mere courtesy which requires this; for this extraordinary case of an armed ship travelling along with merchant-ships is not a *casus fœderis* that is at all so provided for in the treaty; however, if it is a rule, it was complied with in the present instance, and the answer returned was, that "they were Swedish ships bound to various ports in the Mediterranean, laden with iron, hemp, pitch, and tar." The question then comes, what rights accrued upon the receipt of this answer? I say, first, that a right accrued of sending on board each particular ship for their several papers, for each particular ship, without doubt, had its own papers; the frigate could not have them; and the captors had a right to send on board them to demand those papers as well under the treaty as under the general law. A second right that accrued upon the receiving of this answer was, a right of detaining such vessels as were carrying cargoes so composed, either wholly or in part, to any ports of the enemies of this country; for that tar, pitch, and hemp going to the enemy's use are liable to be seized as contraband in their own nature, cannot, I conceive, be doubted un-

tificate had been delivered, and that in them more merchants' goods should be found than were comprehended in the certificates which were brought in, then not only those goods, but the whole ship and goods, as being forfeited, shall be confiscated and seized upon." Promulged 1583. Rym. Fœd. vol. xvi. p. 347–352.

der the modern law of nations, though formerly, when the hostilities of Europe were less naval than they have since become, they were of a disputable nature, and perhaps continued so at the time of making that treaty, or at least at the time of making *that* treaty which is the basis of it, I mean the treaty in which Whitlock was employed in the year 1656; for I conceive that Valin expresses the truth of this matter when he says, p. 68, "*De droit* ces choses" (speaking of naval stores) "sont de contrabande *aujourd'hui* et depuis le commencement de ce siecle, ce qui n'étoit pas autrefois néanmoins;" and Vattel, the best recent writer upon these matters, explicitly admits amongst positive contraband, "les bois et tout ce qui sert à la construction et à l'armament de vaisseaux de guerre." Upon this principle was founded the modern explanatory article of the Danish treaty, entered into in 1780, on the part of Great Britain, by a noble Lord *, then Secretary of State, whose attention had been peculiarly turned to subjects of this nature. I am therefore of opinion, that although it might be shewn that the nature of these commodities had been subject to some controversy in the time of Whitlock, when the fundamental treaty was constructed, and that therefore discreet silence was observed respecting them in the composition of that treaty and of the later treaty derived from it, yet that the exposition which the later judgment and practice of Europe has given upon this subject, would in some degree affect and apply what the treaties had been content

* The late Earl of Mansfield.

to leave on that indefinite and disputable footing on which the notions then more generally prevailing in Europe had placed it. Certain it is, that in the year 1750 the Lords of Appeal in this country declared pitch and tar the produce of Sweden, and on board a Swedish ship bound to a French port, to be contraband, and subject to confiscation, in the memorable case of the Med Good's Hjelpe. In the more modern understanding of this matter, goods of this nature being the produce of Sweden, and the actual property of Swedes, and conveyed by their own navigation, have been deemed, in British Courts of Admiralty, upon a principle of indulgence to the native products and ordinary commerce of that country, subject only to the milder rights of pre-occupancy and pre-emption; or to the rights of preventing the goods from being carried to the enemy, and of applying them to your own use, making a just pecuniary compensation for them. But to these rights, being bound to an enemy's ports, they are clearly subject, and may be detained without any violation of national or individual justice. Thirdly, Another right accrued, that of bringing in for a more deliberate inquiry than could possibly be conducted at sea upon such a number of vessels, even *those* which professed to carry cargoes with a neutral destination. Was there or was there not the just and grave suspicion, which the treaty refers to, excited by the circumstances of such a number of vessels with such cargoes intended to sail all along the extended coasts of the several public enemies of this kingdom, under the protection

of an armed frigate associated with them for the very purpose of beating off by force all particular inquiry? But supposing even that there was not, is this the manner in which the observance of the treaty or of the law of nations is to be enforced? Certainly not by the treaty itself; for the remedy for infraction is provided in compensations to be levied, and punishments to be inflicted upon delinquents by their own respective sovereigns. Article 12. How stands it by the general law? I don't say that cases may not occur in which a ship may be authorised by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission; but where the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages if this is done vexatiously and without just cause; a merchant vessel has not a right to say for itself, (and an armed vessel has not a right to say for it,) "I will submit to no such inquiry, but I will take the law into my own hands by force." What is to be the issue if each neutral vessel has a right to judge for itself, in the first instance, whether *it* is rightly detained, and to act upon that judgment to the extent of using force? surely nothing but battle and bloodshed, as often as there is any thing like an equality of force or an equality of spirit. For how often will the case occur in which a neutral vessel will judge itself to be rightly detained? How far the peace of the world will be benefited by taking the matter from off its present footing, and putting it

upon this, is for the advocates of such a measure to explain. I take the rule of law to be, that the vessel shall submit to the inquiry proposed, looking with confidence to those tribunals whose noblest office (and I hope not the least acceptable to them) is to relieve, by compensation, inconveniences of this kind, where they have happened through accident or error; and to redress, by compensation and punishment, injuries that have been committed by design.

The second special ground taken on the part of the claimants was, that the intention was never carried into act. And I agree with Dr Laurence, that if the intention was voluntarily and clearly abandoned, an intention so abandoned, or even a slight hesitation about it, would not constitute a violation of right. But how stands the fact in the present case? The intention gives way, so far as it *does* give way, only to a superior force. It is for those who give such instructions to recollect, that the averment of an abandonment of intention cannot possibly be set up, because the instructions are delivered to persons who are bound to obey them, and who have no authority to vary. The intention is necessarily unchangeable; and being so, I do not see the person who could fairly contradict me, if I was to assert that the delivery and acceptance of such instructions, and the sailing under them, were sufficient to complete the act of hostility. However that might be, the present fact is, that the commander sails with instructions to prevent inquiry and search by force, which instructions he is bound toobey, and which he is prevented from

acting upon to their utmost extent only by an irresistible force. Under such circumstances how does the presumption of abandonment arise? If it does, mark the consequences; if he meets with a superior force, he abandons his hostile purpose; if he meets with an inferior force, he carries it into complete effect. How much is this short of the ordinary state of actual hostility? What is hostility? It is violence where you can use violence with success; and where you cannot, it is submission and striking your colours. Nothing can be more clear, upon the perusal of these attestations, than that this gentleman abandoned his purpose merely as a subdued person in an unequal contest. The resistance is carried on as far as it can be; and when it can maintain itself no longer, *fugit indignata*.

3. It is said that the papers were not immediately taken possession of, nor proceedings instituted till long after the arrival in port. These are unquestionably irregularities; but I agree with the King's Advocate in maintaining, that they are not such irregularities as will destroy the Captor's right of proceeding, for the Claimant had his remedy in the way of a monition. How these delays were occasioned, whether in consequence of pending negotiations, (as has been repeatedly asserted in the course of the argument,) I am not judicially informed. If such negotiations ever existed, I may have reason personally to lament that they have proved ineffectual. But the legal consequence of that inefficiency undoubtedly is, that the

question of law remains the same as if no such negotiation had ever been thought of.

4. It is lastly said, that they have proceeded only against the merchant-vessels, and not against the frigate, the principal wrong-doer. On what grounds this was done, whether on that sort of comity and respect which is not unusually shewn to the immediate property of great and august Sovereigns, or how otherwise, I am again not judicially informed; but it can be no legal bar to the right of a plaintiff to proceed, that he has for some reason or other declined to proceed against another party against whom he had an equal or possibly a superior title. And as to the particular case of one vessel which had obtained her release and a re-delivery of her papers, the act of the Captors may perhaps furnish a reasonable ground of distinction with respect to her own special case; but its effect, be it what it may, is confined to herself, and can be extended no farther.

I am of opinion, therefore, that special circumstances do not exist which can take the case out of the rule which is generally applicable to such a state of facts; and I have already stated that rule to be the confiscation of all the property forcibly withheld from inquiry and search. It may be fitting (for any thing that I know,) that other considerations should be interposed to soften the severity of the rule, if the rule can be justly taxed with severity; but I have neither the knowledge of any such considerations, nor authority to apply them. If any negotiations have pledged (as has been intimated) the honour and good faith of

the country, I can only say that it has been much the habit of this country to redeem pledges of so sacred a nature. But my business is merely to decide whether in a Court of the Law of Nations a pretension can be legally maintained which has for its purpose neither more nor less than to extinguish the right of maritime capture in war; and to do this, how? by the direct use of hostile force on the part of a neutral state. It is high time that the legal merit of such a pretension should be disposed of one way or other,—it has been for some few years past preparing in Europe,—it is extremely fit that it should be brought to the test of a judicial decision; for a worse state of things cannot exist than that of an undetermined conflict between the ancient law of nations, as understood and practised for centuries by civilized nations, and a modern project of innovation utterly inconsistent with it; and in my apprehension, not more inconsistent with it than with the amity of neighbouring States, and the personal safety of their respective subjects.

The only remaining question which I have to consider is, the matter of expenses; and this I think myself bound to dispose of with as much tenderness as I can use in favour of individuals. It is to be observed, that the question itself was of an importance and delicacy somewhat beyond the powers of decision belonging to such persons,—the authority of their country has been in some degree surprised in this matter,—the Captors have been extremely tardy in proceeding to adjudication. Attending to all these

considerations, I think the Claimants are clearly entitled to have their expenses charged upon the value of the property up to the time of the order for farther proof. From that time the property might have been withdrawn upon bail, and it is no answer to the Court to say that this gentleman or another gentleman did not think it advisable to commit their private fortunes in the extent of the security required. It is the business of foreign owners who have brought their ships and cargoes into such situations of difficulty to find the means of relieving them when the opportunity can be used. I go sufficient lengths in allowing expenses for the further time in which orders could have been obtained from Sweden, and I fix this at the distance of two months from the order of further proof; and, condemning the ship and cargo, I direct all private adventures to be restored.

This is the substance of what I have to pronounce judicially on this case, after weighing with the most anxious care the several facts and the learned arguments which have been applied to them. I deliver it to my country, and to foreign countries, with little diffidence in the rectitude of the judgment itself; I have still more satisfaction in feeling an entire confidence in the rectitude of the considerations under which it has been formed.

CASES

DETERMINED IN THE

HIGH COURT OF ADMIRALTY.

INSTANCE COURT.

THE GRATITUDINE—MAZZOLA, Master.

Power of a Master over his Cargo in Cases of Distress—A Master may hypothecate his Cargo on Freight for Repairs in a Foreign Port, such Repairs being necessary for the prosecution of his Voyage.—Decided 18th Dec. 1801.

THIS was a case of considerable importance to the interests of commerce, respecting the power of a master of a vessel to hypothecate his cargo on freight, in a foreign port, for the repairing of damages sustained by the ship at sea; such repairs being absolutely necessary to enable the ship to proceed on her voyage, for the purpose of delivering the cargo, according to the charter-party.

A statement of all the particular facts, together with the principal documents, will be found in the appendix, as abstracted from a very minute account of the proceedings in the Court of Lisbon, from the

petition of the master made to that Court, up to the sentence recording the petition, survey, and estimate, &c.

For the Petition, Arnold and Robinson.—Putting out of the present discussion the justness of the account which has been the foundation of the bond, and the reality as well as magnitude of the difficulties which gave occasion for it, as matters either not disputed, or, if disputed, as fit to be settled, as the Court has intimated, by a reference to the Registrar and merchants, we are called upon to shew by what authority of law the master of a carrier vessel can pledge the cargo, being the property of a general freighter, for the repairs of the ship. In cases not dependent on the necessities of navigation, it would be idle to contend for such a power; but in such cases, adverting to the peculiar situation in which a master is placed in times of danger, and to his known power over the cargo in other analogous cases—such as Jactus and Ransom; adverting to the principles of the maritime law, which impose on the master a particular trust, and require of him a responsibility in cases of emergency for the benefit of the owner of the cargo; it seems to follow as an essential provision of the same system, that he should have a power and authority over the cargo, adequate to the purpose of discharging his duty, and providing for a safe delivery of his cargo at the port of destination. Freight is not earned but on delivery: it is but reasonable on that ground, that when extraordinary exertion is ne-

cessary to effect that purpose, on which his whole interest is made to depend, he should have so much authority as may be necessary to counteract the force of temporary accidents. Again, masters are forbidden,* even in distress, to delay their voyage for want of money in a foreign port. They are indeed directed to write to the proprietors of the cargo, and supply themselves in that way, if it can be done without delay, but at the peril of answering for damages incurred by delay. This responsibility is enjoined upon them by the laws of Oleron, which are in a peculiar manner incorporated into the maritime jurisprudence of this country, being copied into the Black Book of the Admiralty as part of its substance, and being continually referred to in the public instruments of later times† (*H.* 6.) as an important part of the maritime law of this country.

Such a responsibility must, at least, be provided with the means of conforming to it. Accordingly by the express letter of the codes of all the States of

* Laws of *Oleron*, art. 23. "Une marchant frett une nef et la charge, et la mett en chemin; et entre cette nef en une port, et demeure tant que [*denari*] luy faillent, le maittre puet bien envoyer en son pays, pour querir de l'argent; mais il ne doit perdre temps, car s'il le faisoit, il est tenu à pendre aux marchands tous les dommaiges qu'ils auront: mais le maitre peut bien prendre des vins aux marchands, et les vendre pour avoir son estorement. Et quant la nef sera arrivée à droitte descharge, les vins, que le maistre aura pris, doivent etre au feur mys, que les autres seront vendus, ne à greignieur feur ne à moindre: Et aura le maistre son frett dicesulx vins comme il prendra des autres. Et c'est le jugement en cest cas."

† *Contra leges maritimas et statutum d'Oleron.—Juxta formam et statutum d'Oleron.*—Black Book of the Admiralty.

Europe, the cargo is held up as a fund to which, in cases of necessity, the master is allowed to resort. The master may bind it for a ransom bill (*Consolato*, art. 287), or if he becomes a pledge for the payment, the cargo is liable for his redemption; he may throw it overboard to preserve the ship in time of danger; he may sell a *part* in port to provide for the necessities of the ship, and enable him to continue his voyage. The *Consolato del Mare*,* art. 104, directs that if the merchant is present, having money, he shall lend it; if he has not money, the master may sell part of the cargo, giving him a lien on the ship for his security. The same power is given in the art. of the laws of Oleron before cited, and it is copied into the code of almost every state in Europe. It is true, the

* 104. Proceeding on a supposition that the merchants were on board, and having money: "Ancora e tenuto il patrone della nave, che se il mercante haverà denari, et che fussero in loco, che il patrone della nave havesse bisogno di esarcie o alcuna cosa che necessaria fusse alla nave, il mercante gli debba prestare in quel modo, che il nochiero, et gli altri mercanti conosceranno che si debbia fare, e per tale ragione tutti li compagni, et prestatori che nella nave saranno, si debbono tutti obligare al detto mercante; et se il patrone della nave, o gli compagni, o li prestatori trovassino alcun huomo, che gli prestasse, il sopradetto mercante non è tenuto de niente al loro prestare."

105. Supposing that the merchants on board had no mõney: "Se il patrone della nave ha bisogna di denari, e non ne trova, come di sopra è detto, et che fussino in loco sterile, et che quelli denari havesse di bisogno per spacciamento della nave, et se gli detti mercanti non hanno denari, loro debbono vender della lor mercantia per spacciare la nave, et nessuno prestatore, ne compagno non possono dir niente, ne contrastare, insino che que mercanti sieno pagati, salvo che gli salari di marinati. Impero è da intendere, che il mercanti veda et conosca che quello che lui prestera, sia per spacciamento della nave et necessario della nave."

words of these ordinances describe a power to sell a part; but that is not to be taken as a less power than the power of hypothecation, but rather as a greater power including the other, and expressed in that form only, because in the early stages of foreign commerce, it would appear best adapted to obtain credit, inasmuch as a bond to be enforced in a distant country would not be so negociable and so acceptable to a foreign merchant, as the absolute sale and delivery of part of the cargo. Nor is this mere inference unsupported by fact. The ordinance of Antwerp, art. 19, does incidentally mention the power of pledging in the same article. "Le maître du navire ne pourra vendre ni *engager* aucun marchandise *tant qu'*il trouvera argent au change ou grosse avanture—Pourra à *toute extremité* vendre des marchandises chargées." The object of this article seems to have been to lay restraint on the master in ordinary cases; yet the power of engaging the cargo is forbidden only *conditionally* and *sub modo*; and from the manner in which it is mentioned, it appears to have been considered as a more eligible mode of raising the necessary sums than an actual sale. In the same manner, the laws of Sweden, having forbidden the master to sell more of the cargo than should amount to a fourth part of the value of his ship, prescribe a punishment if he exceeds, "si petulanti modo *vendat vel oppignat* navem et bona in universum, ille non modo tenebitur resarcire exercitoribus et conductoribus omnia damna, sed etiam pro delicto suo plectetur."—*Jus Marit. Suec.* tit. 4. c. 2. sect. 1, 2. In the same manner later

writers speak of the power of hypothecating the cargo in cases of need, as the known law.—*Molloy*, v. 1. p. 334. Bynkershoek, in a treatise on bottomry, describes it—" Contractus quo tota navis et partes, et si *hoc actum est, etiam onus* pro pecunia erogata pignori ponitur: hæc omnia obligavit magister et obligare potuit."—*Q. Jur. Priv.* l. 3. c. 16. In the common law-books of this country, it appears to have been the settled understanding of the Court of King's Bench in the beginning of the last century, *Justis* v. *Ballam*, 1 *Salk.* p. 34, and it is adverted to by modern writers of high authority, as continuing to be the law at this day, *Parke*, p. 413. In addition to these authorities, it is found to have been the constant practice of this Court to proceed upon such bonds; and numerous instances are produced in a list, that has been looked up since this question was first agitated, in which money has been paid out of the Court on bonds enforced against the cargo. On these grounds, the bondholder having lent his money under a security sanctioned by all ancient principle, recognised by constant usage and practice, and not vitiated by any misconduct appearing in the transaction, is entitled to the authority of this Court to enforce the payment of his debt.

For the Proprietors of the Cargo, the King's Advocate, Laurence, Swabey, Adams.—On a question of great importance to the mercantile world, in which, the possible mischief, arising from an abuse of the power contended for, might be immense, it was to be

expected that some very cogent and direct authority would have been produced in support of such a demand. Excepting the list that has been extracted from the registry, of which it does not appear that any one case was a contested case, it may be safely affirmed that nothing in the nature of a judicial precedent has been produced; it may be taken therefore as an admitted fact, that no such authority exists. To supply this deficiency, reference has been made to authorities of another nature, drawn indirectly from principles which govern analogous cases, as they are called, and from the loose dicta of ancient foreign ordinances, and writers on these subjects. Such authorities at best are but very unsatisfactory in cases of great importance; they will appear still farther weakened by the observations that may be made upon them. The cases of Ransom and Jactus depend on other principles, arising out of urgent and instant danger, in which the titles of property are sacrificed, with every other consideration, to the preservation of human life. As to cases of authority exercised over the cargo deliberately and in safety, in a foreign port, the utmost that is directly sanctioned, is a power to sell a part; but this arises from principles very different from those which have suggested this action, and leading to consequences very different from what the proprietors of this cargo will suffer, if the demand can be maintained. The master is the appointed agent of the owner of the ship, and as such competent to bind him in many instances. He is bound to consult the benefit of the owner of the ship, as to the best

means of accomplishing his voyage. The ordinance of the *Hans Towns*, tit. 6, art. 2, *Emer.* v. 2. p. 432, contains a minute description of his duty in such situations, and, as we submit, prescribes the proper limitation of his power. If he is in want of repairs, "Et istic loci nullum cambium ad exercitores transmittendum obtinere queat, aut etiam in navi nulla bona habeat, quæ meliori cum commodo exercitorum, quam pecunia sub fœnore nautico excepta vendere possit; tum hoc in casu necessitatis, pro servanda navi et bonis, habeat potestatem, nomine universorum exercitorum, tantum pecuniæ sub fœnore nautico accipiendi, quantum ad reparationem damni et alios similes casu necessitatis opus habet; et taliter quicquid fœnori accepit, universi exercitores solvere tenebuntur." The whole of his discretion is supposed to be exercised *pro meliori commodo exercitorum*, but he is not entitled to lay any burden on the owners of the cargo. If his ship is disabled by accident and storms from proceeding, he is not bound on their account either to tranship or to repair. It is said that he may repair or that he may tranship; but the law lays no obligation upon him to do either. If he judges it for the advantage of his owner, various modes of raising money are offered to him, and he may so far meddle with the cargo as to sell a part, but not as agent for the proprietor, or as engaging him in the repair of the ship, but as making a forced loan, as it is termed, for the benefit of his employer, and for which the proprietor of the cargo is to be ultimately indemnified, at the price at which the remaining articles sell at the

port of their delivery. In no case was it designed, that the proprietors of the cargo should suffer for the repairs of a ship to which they are strangers, and under the direction of a man for whom they are in no degree responsible. The sale of a part would be easily compensated to them, by the value of the ship and freight; and according to some ordinances, the master was himself personally liable to them (*Em.* v. 2, p. 445). Of a very different nature and extent is this power of hypothecating the whole cargo, by which the burden of repairing the damages of the ship may be, in the event, thrown upon the cargo, and by which all distinctions of general and particular average may be overturned, and the whole expense be thrown as a particular average upon a person no way interested in the vessel. Neither the *Consolato* nor any later codes, mention such a power. If there are instances in which writers appear to attribute such a power to the master, they will be found to be instances relating to cases, where the master is also the consignee of his owner, and the *dominus mercium*, as well as the master of the ship. There is a passage in *Targa*, which points strongly to such a combination of interests, as necessary to support such an act of authority exercised by the master over the cargo: —" Quando il capitano, ó essercitori imbarcano robbe e merci de proprio conto, puono prender danari à cambio maritimo supra corpo e merci *giontamente*, perche hanno la dispositione dell' una et l'altra materia; echi le dà, hà hypotheca piu amplia," c. 32. n. 1. *Erm.* p. 477. When the interests were several, as

the necessary interpretation of this passage seems to imply, no such power could exist to bind the property of another person. Bynkershoek also, in the passage cited, seems to refer to a situation where the ship and cargo belonged to the same person; at least it is far from appearing that he meant to assert, that the master, *qua* master, was empowered to hypothecate the cargo of a general freighter for the repairs of his ship.

Having been speaking of the origin of bottomry, and the simple form in which it continued till the middle of the seventeenth century, as a power given to the master in distress to hypothecate the vessel; —"ita tamen ut duntaxat de navi dominus teneatur, non ultra;" Bynkershoek goes on, "Ad solos magistros, et solas, ut dixi, naves obligatas pertinebat hæc causa mutui, sed deinceps protracta est ad exercitores sive dominos, et mox etiam ad dominos mercium." So far the powers are described *severally* according to the several interests. It is not said, that, by the latest extension, the master was considered as competent to bind the goods as *dominus mercium*. In a following passage, discussing the personal responsibility of the master, he decides against it:—"Nisi magister sit inter ipsos exercitores, vel *onus pro parte ad ipsum pertineat.*" In this instance there was clearly a combination of interests, which, it is not improbable, continued to be in the contemplation of the writer during the next page from whence the passage cited on the other side is taken, if in fact the words *hæc omnia obligare potuit*, are to include the *onus* mentioned in the preceding sentence. He had been just before re-

ferring to some case decided in the council of Holland, in which the fact might be, that the master was part owner of the cargo—or perhaps, as it is more probable, the cargo might not be amongst the things hypothecated; for he begins the whole paragraph, "Dixi, et naves, et instrumenta navium pignori dari," adverting only to the ship; and he concludes immediately after the sentence relied on, "Hæc omnia *instrumenta*, salva creditoribus, non magistro vel exercitoribus," as if his consideration was directed solely to the case of hypothecation of ship and furniture. The other authorities that have been cited, will be found in the same manner irrelevant. Molloy relies entirely on the article of Oleron, and far exceeds his authority in the *dictum* which he advances on the subject. In the same manner the citation from Salkeld is a mere *dictum* of the reporter, not suggested by any of the circumstances of the case, nor depending, as far as it appears, on any thing that fell from the Court; the same case being reported by Lord Raymond without any such observation. The passage from Mr Parke rests solely upon Salkeld. The list that has been extracted from the registry, contains no instance of an adjudged case, and therefore cannot be conclusive.

Upon this view of the argument, it is not too much to say, that nothing has been produced that can have the force of direct authority to support this demand. It is in its consequence of momentous importance to the interests of commerce, and may be pregnant with incalculable mischief, if a power so easy to be abused

should fall into the hands of fraudulent or improvident persons.

In reply, Arnold and Robinson.—As far as the policy and probable effect of the law is to be considered, it would not be difficult to shew, that the power in dispute could operate only beneficially for the interest of the proprietors of the cargo: the master's power, as an absolute power, convertible to purposes of fraud, would in no degree be increased by it; the cargo, in all cases where no supercargo is on board, must be in his possession, and subject, as a possible accident, to misapplication and abuse; the inducement which the allowance of the authority in question would afford, would lead him to come back with his accounts, and submit them to the eye of his employer, and the strict investigation of a court of justice, a temptation as little likely to suggest measures of fraud as any that can be conceived. But was the opportunity of abuse greater, would that impeach the soundness or necessary utility of a general principle? or can it be supposed that this danger is predominant over every other consideration of maritime jurisprudence, when, as far as the not inconsiderable value of a ship extends, that is allowed to be subjected to this danger, by every code that exists. The great object of the law of bottomry is to secure the arrival of the ship and cargo at the port of destination. To this end, a power to sell the ship in a foreign port could not have conduced, and was accordingly never

entrusted to the master: his power over the ship is specifically limited to the power of hypothecation: his power over the cargo is described in general terms to be a power to *sell a part*, but not as excluding the power of hypothecation, in the same manner as the power of *selling* the ship is excluded, for the same reason does not apply: the final success of the voyage never could be frustrated by such an alternative, as to the cargo. In the ancient state of commerce, when intercourse with foreign nations was more limited, hypothecation would not be so good a security to the foreign merchant as the sale and delivery of a part, and, therefore, in the simple language of ancient codes, the most obvious remedy was alone described, not as *excluding*, but rather *including*, the alternative of hypothecation, as a milder remedy, where it could be effectual. Where it can be applied, it is undoubtedly a milder remedy, inasmuch as it insures, or tends to insure, the arrival of the whole adventure at its proper port; and thereby provides, that if the sale of a part is ultimately necessary, it shall be conducted to the best advantage in the market for which it was assorted, and in the hands of the proprietors or consignees. Such a modification is not only to be inferred from the spirit of the ancient codes, and the nature of the subject, but is incidentally expressed in some of them in terms that are too clear to be misunderstood. The regulations of Antwerp use the words, *Ni vendre, ni engager;* and the laws of Sweden, making no use of the expression *oppignare*, as to the amount to which the master's power to sell was allowed, but passing by

that probable contingency without any observation, or without providing any punishment for it, as for an abuse or extension of his power, expressly declare, as to a larger amount, "*Si petulanti modo*," &c. "*vendat vel oppignat ;*" he shall be responsible to the *owner* and *freighter*, *exercitoribus et conductoribus*, &c.

The express prohibition of *hypothecating*, as well as *selling* ship or goods, beyond the fourth part of the value of the ship, connected with the omission of any mention of *hypothecating*, *within* the limits prescribed *for selling*, justifies us in supposing that as far as the master was allowed *to sell*, he was *not* prohibited *from hypothecating*. It appears also that he was equally free to act in this manner with respect to the goods, whether they belonged to the owner of the ship or not; for his responsibility being put severally, when he *was* responsible, *exercitoribus vel conductoribus ;* when he *was not* responsible (*that is*, either for hypothecating or selling within the prescribed limits), it would be to the same several interests, to *his owner or freighter*, that no responsibility was due. It cannot, therefore, be maintained, that in all cases universally where a power over the cargo was attributed to the master, it was in contemplation of an union of interest in his employer. Indeed the whole of that hypothesis seems to be unfounded. It is built upon a passage in Targa; but that passage does not relate to bottomry, properly considered, as the resources for cases of distress in a foreign port: it applies to the contract *à la grosse*, at the commencement of the voyage in the port of the proprietors, and is rather to be

taken as a contract on *respondentia.* The passage is so cited by Emerigon in his chapter *contrat à grosse,* having been passed over without notice in the preceding chapter, where the writer is treating expressly of the power of the master to sell part of his cargo in a foreign port. The same observation applies to the argument from Bynkershoek: he is evidently speaking in some parts of the chapter on bottomree, of bonds given in the port of departure, which, as to the cargo, must be bonds on *respondentia;* on this account, he may have delivered himself with less perspicuity than is generally natural to him. But, in the passage cited, the cargo is expressly included, as being under the power of the master, and the obvious sense of his terms imports it to have been his opinion that the master, *as master* only, was, on particular emergencies, competent to bind the cargo. On any other supposition, if he had been the owner of the cargo, or the constituted agent of the ship and cargo, there would have been no reason for any order or limitation in the manner of doing it; he might have elected his remedy, either on ship or cargo; instead of that, it is now put subject to the prior hypothecation of the ship, "*si hoc actum* est, etiam *onus* pro pecunia erogata pignori ponitur."

Another argument has been built on a supposition that the master was bound only to act for the benefit of the ship—that he was not called upon to act for the cargo—that the law did not authorize him to bind the proprietor of the cargo; and that his power to sell a part was understood only as a power to make a tem-

porary loan, for which the proprietor must in all instances be indemnified. It has been before observed, that the master is in some cases made responsible to the owner of the cargo for the delay of his voyage arising from distress. It will be a sufficient answer to the latter part of this argument to say, that the fact of a supposed indemnification in all cases cannot be maintained. It appears that a difference of opinion has existed in writers and in codes on this point. The laws of Wisbuy had provided for such an indemnification, and directed, " Le navire venant à se perdre, le maitre sera neanmoins tenu de payer au marchand les susdites marchandises." Valin and Potier seem to have concurred in this opinion; but Emerigon opposes them, on the ground that in the older and more general codes, it never had been so established, and he cites against them the article of the *Consolato* 105, and says, " Il ne reserve aux proprietaires des marchandises vendues, q'un simple privilege et préférence, sur le navire." He cites also the 23d article of Oleron and the 19th, reglement d'Anvers, to the same effect; and he concludes a following chapter, by giving his opinion on a case so similar to the present, that, excepting the difference of sale and hypothecation, it is directly in point. From that opinion we learn, that it by no means appeared monstrous or unreasonable, to one of the best writers on maritime law, that, in some extreme cases, the repairs of a ship, for the prosecution of the voyage, might be greater than the proceeds of the ship and freight, and that on such an occasion a loss might eventually fall upon the cargo,

very consistently with sound principle and the general interests of commerce.—" Si au lieu de prendre des derniers à la grosse, le capitaine avoit vendu *pour cause légitime*" (which could only be distress in a foreign port), " une partie des marchandises du bord, et que au retour du voyage, le navire et le fret (aggravés par des engagemens posterieurs et par les salaries de l'equipage) fuissent insuffisans pour rembourser le prix des dits marchandises, cette partie devroit etre supportée au sol la livre par les autres marchandises;" and farther, " celui dont les effets sont vendus, pendant le voiage pour les necessités de la navigation, n'a pu ni s'y opposer ni se procurer aucune resource particuliere contre le personne du capitain. Il est donc juste qu'en cas d'insuffisance du navire et du fret, abandonées par les proprietaires, la perte soit regalée sur l'universalité des chargeurs, dont la condition doit être égale."—Vol. ii. p. 468.

JUDGMENT.

Sir W. Scott.—This case has been learnedly argued; and I have thought it due, not only to the arguments, but also to the extreme importance of the question, as affecting the commerce of this country, to take some time for deliberation in forming my judgment upon it. The case comes on, upon petition, which states, " That the Imperial ship the Gratitudine, having on board a cargo of fruit, and bound from Trieste, Zante, and Cephalonia, to London, met with extremely tempestuous weather, and sprung a

leak, whereby the cargo sustained considerable damage; that the master was obliged, for the safety of the ship and cargo, and for the preservation of the lives of the crew, to put into Lisbon, and unlade; that the master applied for advice and assistance to F—— Calvert, who was the correspondent of Mr —— Powell, one of the principal consignees in England; that Mr. Calvert wrote a letter to Mr Powell, advising him of the misfortune which had befallen the cargo, and the steps which had been taken, and desiring his directions for their farther conduct; that in answer to that application, he received a letter from Mr Powell, stating, 'That to the master it belonged exclusively to adopt every necessary measure for the preservation of the cargo, and that if it was necessary to unlade, the master alone was to judge of the propriety of such a measure.' That the master being in want of money to defray the charges of repairing the vessel, and of unlading the cargo, borrowed of the aforesaid F. Calvert the sum of L.5273, 12s. on a certain bottomree bond, bearing date 31st January 1801, binding the ship and appurtenances, cargo, and freight, to pay the said sum of L.5273, 12s. within twenty-four hours after the arrival of the said ship in the port of London, or any other port; that the said bond had been duly presented to the master, who refused to discharge it; that the holder had no other means of recovering his debt, than by proceeding against the ship, freight, and cargo, and prayed the Court to decree a monition against the bail given, to

answer the action in respect to the cargo and freight, for payment of the balance due, after payment of the proceeds of the sale of the ship."

On the other side it is alleged—" That the master had not, *under the circumstances stated*, a right to hypothecate the cargo for the repairs of the ship; for payment whereof the ship, her master, owners, and freight are liable; that the cargo is by law only subject to pay an average proportion of the charges, to which the cargo laden in the said ship was liable to, for the unlading and reshipping the cargo and other expenses relating thereto; all which, with the freight, the parties had always been and were willing to pay."

The proposition contained in the act does not go the length of asserting universally, that the master has not a right to hypothecate his cargo in any possible case, but denies the power of the master to hypothecate it *under the circumstances* of this particular case. In the course of the discussion, however, the argument has been carried to the entire extent, and it has been contended, that the master has no right to bind the owners of the cargo in any case; upon this ground, that although he is the agent and representative of the ship, and by virtue of that relation may bind the ship and its owners, he is not the agent of the proprietors of the cargo, and therefore cannot bind it. It is said, that he is the mere depository and common carrier, as to the cargo, and that the whole of his relation to the goods is limited to the duties and authorities of safe custody and conveyance. This position, that *in no case* has he a right to bind the

owners of the cargo, is, I think, not tenable, to the extent in which it has been thrown out; for though in the ordinary state of things he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law. Unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care, it must unavoidably be admitted, that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea, as in intermediate ports, into which he may be compelled to enter.

The case of throwing overboard parts of the cargo at sea is of that kind: nothing can be better settled than that the master has a right to exercise this power, in case of imminent danger: he may select what articles he pleases; he may determine what quantity, no proportion is limited; a fourth, a moiety, three-fourths, nay, in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, it never can be maintained that he might not throw the *whole cargo* overboard—the only obligation will be, that the ship should contribute its average proportion. It is said this power of throwing over the whole cannot be but in cases of extreme danger, which sweeps all ordinary rules before it, and so it is. So likewise with respect to any proportion, he can be justified on-

ly by that necessity; nothing short of that will do; the mere convenience of better sailing, or more commodious stowage, will not justify him to throw overboard the smallest part: it must be a necessity of the same species, though perhaps differing in the degree.

Another case is that of ransom; in which, it is well known, that by the general maritime law, a master could bind by his contract the whole cargo, as well as the ship: he could not go beyond the value of the goods, but up to the last farthing of their entire value, there is not a doubt but he might bind the cargo as well as the vessel. A very modern regulation of our own private law, founded on certain purposes of policy, has put an end to *our* practice of ransoming; but I am speaking of the general maritime law and practice, not superseded by private and positive regulation.

These are instances of authority at sea; there are other cases also in port, in which the master has the same authority forced upon him. Suppose the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor; suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed in time. In such emergencies, the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law, that the cargo should be left to perish without care. What must be done? He *must* in such case exercise his judgment, whether it would be better to tranship the cargo, if he has the means, or to sell it. It is admitted in ar-

gument that he is not absolutely bound to tranship; he may not have the means of transhipment; but even if he has, he may act for the best in deciding to sell; if he acts unwisely in that decision, still the foreign purchaser will be safe under his acts; if *he had not* the means of transhipping, he is under an obligation to sell, unless it can be said that he is under an obligation to let it perish.

With respect to practice, I understand from a gentleman very conversant with the commerce of the West Indies, that it is by no means unfrequent for an application to be made to the Vice-Admiralty Courts in that part of the world, for leave to empower the master to sell; I understand it likewise to be matter of complaint, that this power is sometimes abused by an improvident and collusive sale of cargoes, when no real necessity exists; that is, in other words, that the power is usurped in cases where the party does not legally possess it. But the very ground of the defect of power in such cases, implies and affirms its existence, in cases where the necessity is real.

In all these cases, the character of agent respecting the cargo is thrown upon the master, by the policy of the law, acting on the necessity of the circumstances in which he is placed. But it is said, that this can only be *done for the immediate benefit of the cargo*, and not *for the repairs of the ship*. It is very true that this involuntary agent ought, like an appointed agent, in all cases to act for the best respecting the property. Even in the case of an universal

jactus, which appears least likely to conduce to the benefit of the cargo, still *it is so*; the ship is compelled in that case to pay an average, by which means the little which is to be taken as a remnant of the cargo is preserved; whereas otherwise both ship and cargo would have been totally lost. In the case of ransom, what was intended for the benefit of the cargo *may* eventually consume the whole; the proprietor will not be benefited in such a case, but he cannot be damnified; he will have had the chance of advantage without the danger or possibility of loss; for he cannot suffer beyond the value of the cargo, which, without such ransom, would have gone to the enemy *in toto*. It is the same consideration which founds the rule of law, that applies to the hypothecation of a ship. In all cases it is the prospect of benefit to the proprietor, that is the foundation of the authority of the master. It is therefore true, that if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs; but it appears to me that the fallacy of the argument, that the master cannot bind the cargo *for the repairs of the ship*, lies in supposing, that whatever is done for the repairs of the ship, is in no degree, and under no circumstances, done for the benefit, or with a prospect of a benefit to the cargo; whereas the fact is, that though the prospect of benefit may be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo, and is justly to be considered as done for the common benefit of both ship and cargo.

Suppose the cargo to be not instantly perishable, but that it can await the repair of the ship, what is the master to do in the situation before described, being a stranger in a foreign port, in a state of distress, without an opportunity of communication with the owners or their agent? What is his duty under such circumstances? It may be answered generally, *to look out for the means of accomplishing his contract, if possible; that is, the safe conveyance of the property entrusted to his care, in that same vehicle which he had contracted to furnish.* It is admitted that though empowered to tranship, he is not *bound* to tranship. No such obligation exists according to any known rule of the maritime law; and if it did, still he must be affected with the opportunity of transhipment, and with wilful neglect of such opportunity, for wilful neglect shall not be presumed. He may even be restrained from transhipment if he has the means, by knowing that insurances were made on the original shipment, which might be avoided by such a change. Having the general duty of carrying the cargo to the place of destination imposed upon him, not being obliged to tranship, and it not being shewn that he has the opportunity of transhipment, he must be presumed to look out for the means of repairing his ship for the accomplishment of his contract. The first and most obvious fund for raising the money, is the hypothecation of the ship; but the foreign lender has a right to elect his security, for he is not bound to lend at all; he may refuse to lend upon the security of the ship, or on that security alone;

it is no injustice on his part; and if he does so refuse, the state of necessity still continues.

The security of the ship not being sufficient, and the master not being able to raise money on that alone, what is he to do? It cannot be said, that he is in all cases to wait till he hears from a distant country. The repairs may be immediately necessary; it may be hoped that the repairs will be far advanced before he can hear from the consignees; the master may not know the proprietors at all, but only the consignees; they may be mere consignees, and have no power to direct him, but in the single case of an actual delivery to them; if owners they may be very numerous; for in a carrier ship there may be a hundred owners of the cargo, and the master may be in danger of receiving an hundred different opinions, supposing it were possible for him to apply to all. What does the necessity of such a case offer to be done? I conceive one of two things—*to sell a part of the cargo,* for the purpose of applying the proceeds to the prosecution of the voyage by the repair of the ship, *or to hypothecate the whole* for the same purpose. With respect to the former, the books overflow with authorities, many of which have been stated; they all admit that he may sell a part; some ancient regulations have attempted to define what part; others have not. The general law does not fix any aliquot part; and indeed, it is not consistent with good sense to impose a restraint, or to fix any limitation to measure a state of things which is to arise only from necessity. It must, generally speaking, be adequate to

the occasion. One limitation, however, the policy of the law necessarily prescribes, that the power of selling cannot extend to *the whole*, because it never can be for the benefit of the cargo, that *the whole* should be sold, to repair a ship which is to proceed *empty* to the place of her destination. There will, in that case, be no safe custody and transmission; and therefore the power of selling for the repairs of the ship, must be limited to the sale of *a part*, though it may not be possible to assign the exact part, except where positive regulations have fixed it.

But hypothecation may be *of the whole*, because it may be for the benefit of the whole, that the whole should be conveyed to its proper market; the presumption being, that *this hypothecation of the whole*, if it affects the cargo at all, will finally operate *to the sale of a part*, and *this* in the best market, at the place of its destination, and in the hands of its proper consignees. In the unfortunate case before us, in which there has been such a combination of calamitous circumstances as can hardly be expected to happen again, the loss of a part of the whole, sold in the hands of its proper consignees, is all the effect that will be produced; and it can hardly ever happen that the hypothecation will reach the total value of the cargo. On the other hand, the safe conveyance of a valuable cargo may be, in many instances, of infinitely more value to the merchant, than the whole expense of the repairs, if the whole *could* be devolved on the cargo. Generally it cannot be so; in the very form and structure of the bonds, the ship and freight

being usually the first things that are hypothecated; but if it were to happen that they were omitted in the literal terms of the bonds, still they would be liable in contribution to the extent of their value, although the cargo alone had been made immediately answerable to the foreign lender, who has nothing to do with averages of any kind. On principle, therefore, the right of hypothecation of the whole cargo is extremely natural, and if I am right in considering it as equivalent to a sale of a part, it is little more than what all the books of maritime jurisprudence direct to be done; it is in truth but a power to make a partial sale, conducted with greater probability of ultimate advantage to the whole; for as all must finally contribute in the case of an actual sale of a part, what new hardship is imposed? All contribute in this, as a portion of the whole value of the cargo is abraded for the general benefit, probably with less inconvenience to the parties, than if any one person's whole adventure of goods had been sacrificed by a disadvantageous sale in the first instance.

Cross accidents may intervene in the sequel, to make the contract of hypothecation less beneficial than might have been expected at the time. In the present case, the ship was estimated by public authority at Lisbon at L. 2300; the freight amounted to as much; the sum to which it is admitted the cargo is liable for its own proper charges, would have made up almost the whole of what remained, so that a very small part of the cargo would have been affected. It has happened by subsequent accidents, that the mat-

ter has turned out so as to affect a larger portion of the cargo; but subsequent accidents, as it was observed in argument, cannot invalidate the original contract. The worst that can happen, and this only by a most perverse combination of circumstances, is, that the whole value of the cargo might be answerable; still I should say, speaking with all the caution that is due on such important interests, better is it that this should happen (if it can happen) in a few very eccentric and almost unnatural instances, than that the master should have *no* discretionary power to act for the preservation of the cargo; but that he should be compelled, in all cases and under all circumstances, to proceed to the sale of possibly a considerable part of his cargo at a most improper port, for which his cargo is not adapted, as a distressed man, and as a man whose distresses are known to every person who has to deal with him in the purchase of those parts of his cargo.

An extreme case has been put by the King's Advocate, of a large and valuable ship with a cargo of inconsiderable value, belonging to Dover, and falling into this distress in a neighbouring port, as at Calais; and it is asked if it would be reasonable to consume a small cargo in the service of a ship so situated? It may be sufficient to answer, that it is not the case before the Court; and that it differs from this case in the exact proportion of the difference of the distance between London and Lisbon, and of that between Dover and Calais. Supposing such a case, it would be expected, undoubtedly, that the master should use

his utmost endeavours to correspond with the consignees or proprietors; but a case of instant necessity might occur even so near; the master might not be able to receive their directions; all communication might be interrupted, as it is sometimes for a fortnight or three weeks, or more, in adverse or tempestuous weather, and then the same principle would apply. But whatever might be the objection to such a case, just the same objection would lie against the known and admitted power of the master to hypothecate the ship, supposing the owner of that ship to live at Dover. If necessity was urgent, even that extreme case would come under the operation of the same principle.

So much upon mere principle. How does the matter stand with regard to authorities? In the first place, it is not improper to observe, that the law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law, it supersedes rules; and whatever is *reasonable* and *just* in such cases, is likewise *legal*; it is not to be considered as matter of surprise, therefore, if much instituted rule is not to be found on such subjects. In the next place, if I am right in considering *hypothecation of the whole* as equivalent to *the sale of a part*, then all authorities for a partial sale are authorities also for a total hypothecation. Thirdly, I must observe that it is not to be expected that the ancient codes should contain much precise regulation, or direct authority on this subject; this contract of bottomree being comparatively of later growth, and arising out of the ne-

cessities of an enlarged commerce. Bynkershoek expresses himself, I apprehend, with great historical accuracy on this subject, when he says, "Origo hujus contractus ex jure Romano, sed quæ ibi legimus vix trientem absolvunt totius argumenti—Adeo tenuia etiam apud nos fuerunt ejus contractus initia, ut non nisi mutuum significaverit, quo magistro peregre agenti permissum est, navem ex causa necessitatis obligare." But still I think authorities are not wanting from the ancient codes. The passage which has been cited from the Consolato, art. 105, is applicable. There it is said, that a merchant being on board a ship with his goods (which was the custom, according to the simplicity of ancient commerce), having money was obliged to advance it, for the necessities of the voyage; and if he had not money, the master might sell a part of his lading. The ordinance of Antwerp likewise seems expressly to recognise it; and the passage of Bynkershoek which has been cited, seems to me to be capable of no other interpretation. The passage is very general in its terms, and is by no means limited to the peculiar case in which the owner of the ship is likewise owner of the cargo. The *dictum* is perfectly unqualified in describing the authority of the character of master.

So far for foreign authorities. Upon the authorities of our own law, it is to be observed, that the power of hypothecation has been but incidentally noticed in the books of the common law, because such bonds are exclusively proceeded upon in the Courts of Admiralty, which can alone give the possession of the *Res*, which

is the actual security in dispute. It is principally in attempts to obtain prohibition, that the power of hypothecation can be noticed by the common law; and what is only incidentally noticed in the Courts, is of course but slightly and indistinctly noticed by the writers. It is of importance, however, that wherever occasion has called for incidental observations on this contract, it appears to have met with countenance. A dictum expressly recognising such a power, appears to have dropped from L. Hardwicke in the case of Buxton *v.* Snee,* where it is spoken of as a power *arising out of his authority as master, and the necessity thereof during the voyage, without which both ship and cargo would perish*, and as a power which *both the maritime law and the law of this country allow.* An earlier instance is that in Justin *v.* Ballam.† How that dictum arose, does not sufficiently appear; there was nothing, I find, on reference to the books of the Court of Admiralty, in the circumstances of the case, to lead to it, as it was a case of a suit against the ship only, for a cable and anchor supplied in the Thames, by merchants of this town. Whether it was a dictum of the Court, or only of the counsel, *non constat;* it might have found its way into the argument, and have received incidentally the countenance of the Court, though, it is true, the report of the same case by L. Raymond makes no mention of it. It is at the very lowest the impression of that reporter, although the reason assigned for it is expressed in too general terms; for the master does not *ordinarily* re-

* 1 Vesey senior, 155. † 1 Salkeld, 34.

present the owner of the cargo as well as of the ship, but only in cases of accidental necessity, in which the policy of the law throws that character upon him. This dictum, wherever it comes from, derives some confirmation from its reception into the *Digest* of Lord Chief Baron Comyns (tit. *Admiralty* E. 10), where it is cited amongst the rules of unquestioned authority. I observe that Mr Viner (tit. *Hypothecation*, A.) in citing the case of Trantor and Shippin (which in other books is denominated Trantor and Watson), represents Mr Justice Powel as expressly extending the master's power of hypothecation to the goods; but from a report of the same case (6 *Mod.* 13), he rather appears to have said no more than that "*if the master possessed such a power*, it would bind the property in the hands of a third party;" on which it is to be remarked, that although this hypothetical form of speaking asserts nothing directly, it pretty strongly implies, that that able and learned judge, as I have always understood him to be traditionally reputed, did not feel any of his notions of law or equity offended by the supposition, that such a power legally existed. Of Molloy I say nothing, knowing well that the authority to which he refers does not sustain him, and that his own authority amounts to little.

These passages are all that I can find affirmatively in the common law writers; but it is no slight negative argument of the understanding of the common law, and no small confirmation of the fitness of this principle, that during a long series of years, no instance has happened in which a prohibition to the en-

forcement of such a contract has issued; and the inference will be the stronger, if it shall appear that numerous suits have actually been entertained in the Court of Admiralty on such bonds. The mention of numerous suits brings me to the result of a research which I directed to be made in the records of this Court; a Court whose practice on a question of this nature—a question of the general maritime law—is not without its authority. I find from the list that has been returned to me, that there has been, in later times at least, a constant practice of proceeding upon such bonds, as well against the cargo as the ship. How early this practice may have prevailed, or what may be the most ancient instances of it to be found in these records, has not been ascertained; but I find two instances in the year 1750, and from that time downwards, there is a list of twenty-three or twenty-four cases, in which the proceeding has been in some against the cargo only, in others (and much more generally) against the ship and cargo together. In some of these cases protests have been entered, almost to the extent of the present protest, denying the power of the master to bind the cargo under the circumstances of those cases; but these protests have been either waived or overruled. In the year 1786 there was the case of the Vier Gebroeders, in which I was of counsel, and although the decision, as it is said by the King's Advocate, proceeded on other grounds, the fact appeared that the master had exercised this power, and it seemed to be admitted, tacitly at least in the argument, that he possessed generally such a

power. It is likewise something in addition to the practice of this Court, that such bonds are frequently occurring in the practice of merchants, being notoriously given and taken; and the practice of merchants in such a matter, goes a great way to constitute that *lex mercatoria* which all tribunals are bound to respect, wherever that practice does not cross upon any known principle of law, justice, or national policy. Adverting, therefore, to the fair foundation of the general principle, and to the authority of the maritime law, as it has been for some years practised in this Court, and countenanced in all the instances in which it has been brought to the notice of the courts of common law,—adverting also to the practice of what I may call the *lex mercatoria*, I think I am warranted in pronouncing for the power of the master, to bind the cargo for the repairs of the ship, in order to effect the prosecution of the voyage, in such a manner as to entitle the party who advances the money, to sue for the enforcement of his bond in the Court of Admiralty. At the same time I think myself bound to observe, that it is perhaps the first instance in which a judgment has been demanded upon this point; and, as I cannot but feel, with peculiar weight, the insufficiency of the opinion of any one individual to decide on such extensive interests as may depend on this question, in such a commercial country as this, it becomes me to suggest, that it may perhaps be not improper that a resort should be had to the collective wisdom of another jurisdiction.

It remains to consider whether the situation of the

master was such as to authorize the exercise of this power, which, I have said, only in the case of a severe necessity may belong to him; and, 2dly, Whether the lender has at all acted unfairly under that necessity, by taking undue advantage, so as to vitiate the contract either in the whole or in part; for it must be proved upon the lender that he has taken such undue advantage. It will not be sufficient, either upon principle or upon determination of the Court, that the master has taken undue advantage against his employer; that is a matter between him and his employer, with which the third person has nothing to do, unless personally implicated by the facts of the transaction, in the fraud that may have been practised.

The protest of the master states, "That he sailed from Trieste with his ship in good condition; that he went to Venice, Zante, and Cephalonia, and took in a cargo of fruit for London; that in the course of his voyage to London, he met with tempestuous weather and sprung a leak, so as to make it necessary to unship and reload; that he proceeded to Gibraltar, but that a gale of wind sprung up and drove him off from that port without a bill of health; that he approached the bar of Lisbon, but was not permitted to enter on account of his not having a bill of health; that he was proceeding on his voyage, when he was again driven back by tempestuous weather into Lisbon, in a state of as complete distress as he could possibly be." What was he to do in this situation? It is admitted that he was not obliged to tranship; if at liberty so to do, still he knew that his cargo was in-

sured in that very ship, and that all his policies would be voided upon a transhipment. To have sold the whole or parts of a cargo consisting generally of fruit, in a fruit country, would scarcely be thought advisable. It is said he might have written to the proprietors; but it does not appear that he knew who the proprietors were. Those to whom he was to deliver, might be mere consignees. The Court would undoubtedly be very unwilling to relax the general obligation of masters to correspond with the proprietors, where it is practicable; but taking the obligation to be such, the master *has* complied with that obligation; he applied to the correspondent of the principal consignee, and through him to the consignee who is described as owner of a part of the cargo. From him he received an answer sent by that consignee and proprietor, Mr Powell, expressly declining to give particular directions, and referring him entirely to his own discretion. From that conduct, I think that all the authority that might become necessary for the preservation of the cargo, was devolved upon him by the very act of the consignee, even if he had not possessed it under the general law; for if he was remitted to his own discretion, every thing then which he did under that discretion justly exercised, was expressly warranted by the act of his employer, so far at least as the interests of that particular employer were concerned. Certain it is, that no such directions, given or withheld by that employer, could at all affect the agency of the master, with respect to the other parts of the cargo in which that employer was

not concerned. With respect to them, he possesses the authority which the general law gave him, and no more.

In the state of consummate distress in which he arrives at Lisbon, what is this man to do? A great deal of argument has been used to shew what he should *not* have done. I could have wished that a word or two had been employed in shewing satisfactorily what he ought to have done, or could have done with more propriety in this situation. It has been said there was the ship and freight. He has acted rightly in binding *both* in this very bond. It has been added that he might have bound himself. This also he has actually done; though I presume that the mere personal security of such a man, a hired master of a vessel, would go but a little way to satisfy a foreign lender of money.

It is said that he ought to have bound his owners likewise; but those who propose that, should first prove his authority to bind his owners personally beyond the value of the ship (which value he has already bound), and likewise find merchants at Lisbon who would be willing to advance money upon the personal security of the owners living at Trieste, whom they might be under the necessity of ultimately following into a personal suit in the Supreme Court of the empire. Then the ship and freight being pledged, and the master having no other funds, and being anxious to convey the cargo to the place of its destination, what could he do better than hypothecate the cargo, under the reasonable expectation which this

case afforded, that the ship and freight, and average expenses falling particularly on the lading, would have been sufficient to discharge the bond, without calling on the cargo? In pursuing this resolution, it was hardly possible for a man to act with more caution than this master appears to have done. He applied not only to the consul of his nation, but likewise to the court of justice in the foreign country. It seems to be the particular regulation of that country, that matters of this nature shall not be transacted without the sanction of a court of justice. As to the policy of that regulation, doubts may be entertained, whether it might not be safer to leave matters of this sort to the vigilance and honesty of the parties entrusted, rather than to the superficial attention which may be given by persons employed to inspect the circumstances of the case by a court of justice. The Court at Lisbon, however, proceeded to examine the truth of the representation given by the master; witnesses were examined; surveys under public authority were made; the result was, that the ship is reported by the surveyors to be of sufficient authority to warrant the repairs. The repairs are made, and the master has the authority of the Court, not only for the propriety of the repairs, but likewise for the reasonableness of his expectation, that the ship alone would be able to answer the expense of them. Still, however, the foreign lender was not obliged to advance money, but on such security as he liked; and in this situation the master pledges the additional security of the cargo. He proceeds on his voyage to

England, and the bond which became due on the event of his arrival is put in suit; the consequence is, that the ship is sold; and being sold as a foreign ship, unable to procure a register, sells for not more than half the value at which she was estimated at Lisbon.

Upon this state of the case, it is evident that instead of the cargo being sacrificed to the ship, which is the present complaint, the ship has been made the martyr of the cargo; for it is in the service of that cargo, that she has been brought to a place where the owners suffer this extreme diminution of her value. In her *unrepaired* state at Lisbon she is valued at six millions of rees, * and therefore would have sold there in that condition for a much larger sum than she produced, after her repairs, by a sale in England, for a purpose which absorbs the whole of her value, freight included, and a good deal more. She adheres with fidelity to her engagements with the cargo, and is a victim to the execution of that duty.

On the whole, I am of opinion that the situation and the conduct of the master has been such, as to justify the exercise of that right which belongs to him in cases of necessity, although interests of the owners of the cargo, whose ordinary agent he is not, may be affected by it; and they must be affected by it, unless it can be shewn that the other contracting party, the money-lender, was prevented from contracting by any incompetency, which would vitiate the whole of the bond, or that he has fraudulently charged sums, com-

* About L.1000.

puting the account for which the bond is given, that would vitiate it *pro tanto*.

With respect to the first, it is true that Mr Calvert (who advances the money at Lisbon) is the correspondent of one of the consignees of the cargo; and it is argued to be an extraordinary thing, and a proof of collusion on his part, that would constitute a total incompetency, that *he the correspondent* should enter into such a contract. In the first place, it is to be observed, that Mr Calvert is the correspondent of one consignee only; and therefore, with respect to all other interests in this ship and cargo, he is, as far as appears, a mere stranger. Secondly, even with respect to the goods of that consignee, I am still to learn, that it is the bounden duty of a foreign correspondent to advance his money without authority, and without such security as he may approve; and thirdly, this consignee having declined to give any orders, and having expressly thrown the whole upon the discretion of the master, I think that Mr Calvert stood with respect to these goods, on the same footing as any other merchant; and if the master was driven to the resource of bottomry, nothing in the relation of Mr Calvert to those goods, created an incompetency in Mr Calvert to advance his money on such security, as any other man might have demanded for it.

There being nothing in the conduct of the parties to invalidate the contract, it remains only to inquire, whether any articles have found their way into these charges, that ought not to have appeared there. It

does not appear that many articles are questionable. I perceive there is a pretty heavy commission charged. I know that the word *commission* sounds sweet in a merchant's ear; but whether it is a proper charge or not on this occasion, I will not take upon myself to determine, without a reference to the Registrar properly assisted. The master, being in a situation of distress, was left to act for the best conveyance of his cargo; and I think he may be fairly supposed to have done so. The bondholder advances the money, having a right to elect his security, and he has run his risk on that security. If the ship and cargo had perished, he would have lost the whole. The owners of the ship have lost all, and there is a great loss besides. On whom is this loss to fall? It can fall only on the proprietors of the cargo, or on the bondholder who has advanced his money, and run his risk upon the given security, and under circumstances which by no means affect him with incompetency to enter into such a contract—a contract from which the cargo has received a considerable benefit. I think that there is no question of the liability of the cargo.

As to some particular goods for which a farther distinction has been taken, on the ground that they are privileged goods, not paying freight, I think that distinction insufficient; they have had in an equal degree the benefit of this conveyance to the place of their destination; and it is not reasonable that they should be exempted from the obligation attaching on the whole cargo, of being amenable for contribution to the bond; although the owner of the vessel might,

as far as his interests alone were concerned, have been willing to shew them a particular indulgence. If they are the goods of the owner of the ship, they can have no more right to be exempted from contributing than the ship itself.

Bond enforced against the cargo.

APPENDIX.

No. I.

(*Translated from the Italian.*)

London, 19th September 1800.

Captain Jacomo Mazzola, Lisbon.

I have this moment received a letter from Mr E. F. Calvert, addressed to my brother and Co., instead of myself, to whom you are consigned, *and to whom the fruit belongs,* jointly with our friends Signior Giovanni Vanautgardin of Venice. I observe with infinite concern that the leak which had not been properly stopped at Cephalonia, *has resprung. To you it exclusively belongs* to adopt every necessary measure for the preservation of the cargo, which I trust, from the precautions you have taken, will not have sustained any injury; and should it even have been advisable to unlade the cargo in order to get at and stop the leak, you alone was to judge of the propriety of such a measure; at all events, I feel it incumbent upon me to observe, that the Lisbon people ought not to be too expensively employed, lest considerable charges should be incurred; the underwriters also strongly rely on your direction in this business. In the mean time, you will take care to write me fully hereon by the first opportunity. I will thank you also to make my best compliments to Mr Calvert, to whom I do not write by this mail; and you will observe *that as the cargo cannot be transported in any other ship, without exposing you to the risk,* I cannot agree to incur great expense. Ever ready to obey your commands, I have the honour to subscribe myself,

Your most obedient servant,

(Signed) Thomas Powell.

No. II.

KNOW all to whom this instrument of bond and bill of maritime risk and bottomry may come, That in the year, from the birth of our Lord Jesus Christ 1801, on the 31st day of the month of January, in this city of Lisbon, in my office personally appeared Jacomo Mazzola, captain of the Imperial ship called the Gratitudine, whom I know to be the real person; and he declared to me, the notary, in the presence of the witnesses herein-after mentioned, that within twenty-four hours after the arrival of his said ship at London, or any other port, and previous to beginning to make any delivery of the cargo at the port aforesaid, or any other port, that he the captain, or whomsoever may act in lieu of him, or in case of his absence, or perform the duties of his said quality, shall or will pay by this bill of risk, sea exchange, and bottomry, to Francis Manoel Calvert, professed in the order of Christ, or to his order, the sum of L.5273, 12s. Sterling, principal and premium of risk and sea exchange, at the rate of 16 per cent., the which principal he acknowledged to have received here of the said Francis Manoel Calvert, in the good current money of this kingdom, under the denomination of true and legitimate money of sea exchange and bottomry, on the hull, keel, and appurtenances of the aforesaid ship, and therewith to supply the wants of the repairs, caulking, and of the cargo of the same, on which he had effectively invested it; the said Calvert taking upon himself, and in consideration of the aforesaid premium of 16 per cent. voluntarily agreed for and settled between them to run the sea risk on the said hull, keel, and appurtenances, and cargo of the said ship, in her ensuing voyage, which the said captain is about prosecuting from this port of Lisbon to that of London—these being the risks which the aforesaid Francis Manoel Calvert takes on himself, and is to run; such as of the sea, winds, fire, stranding and shipwreck, enemies and false friends, detentions of princes and reprizals, during the whole of his said voyage, excepting nevertheless those of barratry of the master, and of average as well particular as general, the which are expressly excluded; the which risk shall commence to be run from the hour the ship shall heave her first anchor to set sail from this port to that of London, and shall cease in twenty-four hours after having come to an anchor; and for the ready payment of the aforesaid sum, he the captain binds himself and his effects in general dues and funds, both in actual possession and future, and

by special mortgage the cargo, freights due, or that may become due; and in case of failure of the prompt payment in due time, he binds himself under this clause of mortgage to pay to him or to his order, for all the delay until full payment at and after the rate of six per cent. per annum; and there being also present Andrew Belucci, mate of the said ship, by whom it was declared, that in case of the absence of the aforesaid captain, he bound himself to fulfil the contents of this bond, they thus executed and accepted, after these presents being read to them, and I, the notary, in the name of whomsoever it may concern, being absent; to all which were witnesses present, Joav Pedro Roeks, who also acted as interpreter as well for the captain as for the mate, he being there vice-consul, and Manoel Eugenio Coetho, who together with the parties signed thereto; J. Joge de Almeida Rorig, the notary, wrote it; Jacomo Mazzola, Andrew Belucci, Joav Pedro Roeks, Manoel Eugenio Coetho, and J. Joge de Almeida Rorig, notary-public of notes in the city of Lisbon and its district, of his Royal Highness the Prince Regent, our lord, whom God preserve, caused this instrument to be transcribed from my book of notes, to which I refer myself, and have subscribed it, and signed it in public form.

In testimony of the truth,

JOGE DE ALMEIDA RORIG.

Whose handwriting is certified by,

FRANCIS ARBOUIN, Vice-Consul.

FRANCIS MANOEL CALVERT.

No. III.

A SCHEDULE of the CHARGES incurred at Lisbon.

N. B.—The Report of the Registrar and Merchants, directed, p. 83. has not yet been completed.

Repairs of the ship, - - - -	L. 2340	0	0
Mariners' wages, thirty and upwards,	1100	0	0
Unlading, warehousing, and reshipping,	700	0	0
Commission at 5 per cent., - -	260	0	0
Bottomry premium, 16 per cent., -	800	0	0
	L. 5200	0	0
Value of the ship as sold in England,	L. 1170	0	0
Freight about - - - -	2240	0	0

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Lisbon.

CIVIL SENTENCE on a Question of Protest arising on General and Particular Average against Wind and Sea.

DON ———, Prince Regent of Portugal, and of the Hither and Farther Algarves, of the African Seà, Lord of Guinea, and of the conquesta navigation and commerce of Ethiopia, Arabia, Persia, India, &c. To all, &c. &c. be it known, That in a court held before the tribunal, certain proceedings were instituted on the petition and protest of J. Mazzola, master of the Imperial ship the Gratitudine; and the said protest herein inserted was pronounced for by the said Judge, as containing all that will by the sentence of the Court be more particularly expressed and set forth. Petition—J. Mazzola sheweth, that he sailed from Trieste with a cargo for London, with his ship stanch and in good condition, 25th January 1800; that he touched at Venice and Zante to deliver sundry goods, and ship others for London, and sailed again 30th April for Cephalonia, where a further part of his cargo for London was to be taken in; that in prosecution of his voyage to that port, he met with so much tempestuous weather and shipped so much water, that he was obliged to unliver the whole of his cargo at Cephalonia for the purpose of careening; that having reshipped his cargo, &c., he sailed again 22d June, and arrived off Gibraltar 25th July, when meeting with a French armed ship that wished to bring him to, he ran into Gibraltar, but was, whilst in the act of casting anchor, and delivering his bill of health to the port-officer, driven out by a sudden gale which obliged him to make for the coast of Spain; that he was again chased by the aforesaid French privateer, but protected by a British frigate which escorted him off Cape Spartel; from whence, being unable to procure his bill of health from Gibraltar, and being in want of water, he determined to go into a port of Portugal to obtain those necessary articles; that the wind continuing to blow on the coast, he was obliged to proceed before the wind, and was driven into Lisbon, 3d August, where he was obliged to moor low down in the river, not being permitted to proceed higher up for want of his bill of health; that on the 9th, a ship sailing outward ran foul a-head of him, and unshipped an anchor; that on the 10th August he set sail in further prosecution of his voyage to London with a north-east wind, and steered his course west-north-west by west for several days under a brisk gale and heavy sea, with reefed topsails, but found, with great

surprise, on the 17th August, that the ship made a considerable quantity of water; from which he first apprehended the leak was in the side, but found afterwards that the water increased to such a degree, that the vessel made from thirteen to fourteen inches of water, so that it was impossible to cease pumping a single moment; that on farther examination he found that two * were stove in, in consequence whereof the whole fore part of his ship was open, and admitted a great quantity of water; that being then in 40° 55′ N. E. latitude, he resolved on tacking to the east, and making the shore as soon as possible with the pumps constantly at work, and a man placed with a light in the hold to watch the progress of the water, in order that if it increased upon them, they might hoist out the long-boat for the preservation of their lives, having previously made every thing ready for that purpose; that in this situation she proceeded till the 28th, when the wind suddenly increased, attended with a heavy sea, which carried away the topmast, with the top-and-main-top-gallant-sails shivered to pieces, the main-yard, cross-jack-yard, and jib likewise carried away; that in this distress they were obliged to cut and clear away the rigging, the stays, and main-top shrouds, and all other ropes that embarrassed the operation of the ship, the water then standing thirty-six inches, and the crew being so exhausted that it was impossible to continue working so as to free the ship; that in this situation they met with a Danish vessel who took them in tow, and brought them off the bar of Lisbon, when a pilot came on board, and was carrying her up to the castle of ———, when an American vessel ran foul of her, and carried away her figure-head, and was so entangled with her that it took more than three hours to disengage her; whereon the petitioner begs leave to establish, by the evidence of his crew, that any loss that may have been sustained by the cargo, &c., did not arise from his negligence, but from the stormy and tempestuous weather; and he further prays that all damages, costs, charges, and expenses that may be occasioned by touching at Lisbon, may be borne by those whom it may concern; inasmuch as he was obliged to put in there for the preservation of the lives of his crew, and the saving of his ship and cargo.

On this statement the boatswain and three other mariners were examined 4th September 1800, before the proper officer of the Court of Lisbon, and their evidence fully confirmed the truth of the master's representation.

* Bocarda.

A survey was also made 27th September 1801 by Joaquim Joge de Aranjo and Antonio de Thoraes, master shipbuilders and sworn appraisers, who reported that in order to put the vessel in a condition to prosecute her voyage, certain specified repairs were necessary, amounting on an estimate of particular items to 700,000 rees;* and that the ship in her present condition, tackle, apparel, &c. was worth six millions of rees; and they further declared, that the ship in question *was sufficiently valuable to warrant* such repairs, and that such would be the expense attending the repairing, by means of the scarcity of timber and other necessary materials, and the enormous wages now paid to the several workmen; *that without such repairs she could not prosecute her voyage.*

The petitioner being informed that the protest and proceedings thereon should be reported to your Excellency, in order to your Excellency pronouncing on the merits of the protest, he therefore prays that your Excelleucy will be pleased to order the same accordingly.

Endorsed,

I do order the same to be carried into complete effect according to law,

MIRANDA.

Then follow several certificates and receipts by different workmen employed on the ship, stating the receipt of their bills from Mr Calvert, the person advancing the money.

* 1000 rees about 5s. 6d.

A DISCOURSE

ON THE

CONDUCT

OF THE

GOVERNMENT OF GREAT BRITAIN,

IN RESPECT TO

NEUTRAL NATIONS.

WRITTEN IN THE YEAR 1758,

By CHARLES JENKINSON, Esq.

late Earl of Liverpool.

A NEW EDITION.

EDINBURGH:

THOMAS CLARK, LAW-BOOKSELLER.

MDCCCXXXVII.

PREFACE.

It having been represented to me that the circumstances of the times, and the questions now in agitation, had induced the public to call for a new edition of my "Discourse on the Conduct of Great Britain, with respect to Neutral Nations;" I was at the same time desired to say, whether I would now think it proper to make any corrections in what I had formerly written on that subject. Three-and-forty years have now elapsed since I first composed that treatise. I have, on the present occasion, again attentively perused it, and, after the fullest consideration, I still continue convinced of the truth of every proposition and argument advanced in it. I have of course abstained from making the smallest alteration in any essential point; but I have corrected the style in some parts, where a more mature judgment has induced me to think the expressions not sufficiently accurate or forcible.

As the claims of neutral nations, particularly of the Dutch, during the war which commenced in 1756, gave occasion to the following treatise, the facts then in existence are necessarily stated in it, though they may not have any immediate reference to the present times. The reasons, however, on which I founded my opinion in many of these cases, apply to similar facts that have lately happened, and will therefore contribute to assist the reader in forming his judgment concerning them. Besides, I did not think it right to erase any thing from a work of which the public have long been in possession.

I must, however, confess, that I was induced to authorize the republication of this work from a motive which

appeared to be in the present moment of great importance—I wished to shew that many of the claims of late years advanced by some neutral nations, had not occurred to any writer on the law of nations, at the time when this discourse was written and published; and that these claims were not even in the contemplation of those powers who resisted the maritime rights of Great Britain, at the period when this work first appeared. It was my intention to have given a short account of these new claims, and of the transactions to which they gave birth; but the present infirm state of my health has disqualified me for an undertaking of this nature; and I find that this subject has been treated with competent information and great judgment, in a course of letters, signed Sulpicius, first published in a morning paper, and since collected into a pamphlet, so that any thing I could now write would be useless repetition.

In addition to the public documents which have appeared on these occasions, and which have been lately collected and reprinted,* some pamphlets have also been published at Copenhagen and Paris, written probably not without some degree of authority from their respective governments, in support of the present claims of neutral nations; which evidently shew, that the enemies and rivals of this country, finding they were no longer able to resist the great superiority of our naval force, which has been so conspicuous during the present arduous contest, are determined, if possible, by establishing new principles of maritime law, to sap the foundation of our maritime power and glory. The authors of these pamphlets appear disposed no longer to resort to those sources and authorities on which the rights, either of neutral or belligerent powers, have hitherto been understood to be founded; they seem, indeed, thereby to confess, that their claims cannot on this ground be defended, and to admit, that the principles of maritime law, laid down in

* See a Collection of Public Acts and Papers relating to the Principles of the Armed Neutrality, printed by A. Strahan, for J. Hatchard, 173 Piccadilly. 1801.

the following work, cannot be controverted. This work, soon after it was published, was translated into almost every European language, and has never, as far as I am informed, received an answer. It is singular, that though so much has of late been heard in all political discussions of natural rights, those who now stand forth in defence of neutral nations, appear to reject all the principles of the law of nature, founded on the right of self-defence, so far as that law is applicable to the conduct of nations in their contests with each other.

They pay also no attention to the respected authorities of all ancient writers on the same subject, such as Grotius, Puffendorf, Bynkershoek, Vattel, and many others, because they find that the decisions of these writers are uniformly unfavourable to their pretensions; they pay as little attention to the principles which have immemorially governed all courts of maritime jurisdiction through a succession of ages, and which have been handed down in a series of records, or authentic documents, published during the course of many centuries. In short, they appear determined to establish a new code of maritime jurisprudence, better adapted to their own views and present interests; and they wish, therefore, to have it understood, that there are no maritime laws but such as are founded on compact or convention, that is, on treaties made between the respective contracting parties. With this view, these enemies and rivals of the naval power of Great Britain have entered into treaties, laying down certain rules which they wish to have observed, and to the observance of which they think they have a right to compel Great Britain, though no party to them. By clamour and combination, they endeavour to obtain our consent for imposing restraints on the exertions of that particular force which the God of nature has given us for our self-defence and security. They wish to prescribe in what manner we shall in future be at liberty to employ it; for they know that then, and then only, they can entertain any hopes of being able to resist the naval power of this country.

The writers before mentioned have, therefore, not only

insisted that neutral ships have a right to carry, and protect from capture, the property of the nations who are at war, or, in other words, that free ships shall make free goods, but they claim,* as a right inherent in every sovereign who professes neutrality, that all mercantile ships, under the convoy of his ships of war, shall be exempted even from search and visitation. A claim of this sort was indeed brought forward in the middle of the seventeenth century, but it was then resisted by the Government of Great Britain. This claim did not form any part of the convention for an armed neutrality in 1780, though it has been inserted in that which was signed at Petersburgh the 16th of December 1800. As far as I am informed, it was first made a positive stipulation, and inserted in the treaty between America and Holland in 1782. † In short, after having been suffered to sleep for more than a century, it was revived towards the conclusion of the late war with America; and some of the powers of the North have been taught to believe, that the honour of their respective sovereigns, as well as the interests of their subjects, required that they should give it all their support; but the Government of Great Britain has again resisted this claim, as not founded on any principle of maritime law, nor supported by any eminent writer, nor consistent with those rights which every belligerent power, for his own security, is authorized to exercise and enforce. In short, such a claim, if it were to be established, would have the effect of preventing all capture of mercantile vessels belonging to neutral states, though they may be carrying enemy's property, or even contraband goods; it would have the effect of giving a right to a government calling itself neutral, to protect the property of the subjects of both the belligerent powers,—a right, however, which would probably be exercised only in favour of that power whose interests it may wish to promote. If no examination is permitted of mercantile ships sailing under

* See Professor Schlegel's pamphlet, Sur la Visite des Vaisseaux Neutres sous Convoi, published at Copenhagen in 1801.

† Article 10, Mart. Tr. V. 2. p. 255.

convoy, all the stipulations in subsisting treaties, which authorize the detention and capture of contraband articles, such as military or naval stores, would be thereby annulled or rendered nugatory; and from henceforth, every belligerent power must rest wholly on the good faith of the officers of a neutral government, who have no sufficient interest in detecting frauds, and who, on the contrary, may have an interest, from pecuniary motives, to protect and even to encourage transactions the most injurious to a belligerent state in a contest, not merely for its honour, but its preservation. It is certain, that, if this doctrine be admitted, the smallest state may lend its flag, and by hoisting it on board a cutter or sloop, may protect any number of ships under its convoy, from all the activity and enterprize of the whole naval power of Great Britain.

These writers wish also to narrow the right of belligerent powers, in the detention or capture of ships going into ports blockaded, by establishing a definition of what shall henceforth be understood to be a port blockaded. It is proved in the following discourse, that no nation has ever exercised this right of stopping and making prize of ships going into blockaded ports, with so much moderation as Great Britain. It must, however, be acknowledged, that the fact, whether a port is blockaded or not, may frequently be a question of difficulty; but it can only be decided by the jurisdictions to which all cases of this sort have universally and immemorially been amenable.

It has ever been the anxious wish of the Government of this kingdom, that the office of Judge of the British High Court of Admiralty should be filled by a civilian of the greatest knowledge and integrity; and the duties of this most important office have at no time been more eminently discharged, than by the distinguished person who now presides in that court, and who, from a conviction of the rectitude of his decisions, has suffered them, together with the reasons on which they are founded, to be published, in order that the world may determine on the

truth of those principles, which, on all occasions, influence and guide his judgment.

A French writer* has carried the claims of neutral nations still farther,—he proposes, as a maxim to be adopted in future, that all capture shall hereafter cease; his words are, "La course est abolie," and then he adds, "En tems de guerre la souverainté de territoire est transporteé avec tous ses droits sous le pavillon des etats qui ne prennent point de part à la guerre."

From these expressions, it may fairly be inferred to be the object of this writer, and of those who employ him, that the detention and capture of such ships only as belong to neutral nations, in time of war, should wholly cease; I think it must be allowed that this proposition, so interpreted, is wholly new, for such a doctrine will prevent the capture of all contraband goods, as well as the property of the enemy found on board neutral ships. If such a doctrine were to be admitted, one branch of the naval power of this country will be in a great measure annihilated, for, in all maritime wars, the people arm in their own defence, and it is not the government alone, but individuals under the authority of the government, who arm and equip vessels against the enemies of their country, for the purpose of reducing them to reasonable terms of peace; the means they employ are, the capture of all the property of the enemy, and the destruction of his commerce, carried on under any pretence or disguise whatsoever. The principle, also, on which this doctrine is founded, is as novel as the doctrine itself; for it is pretended that the right of sovereignty belonging to each neutral state should be transferred to every merchant vessel employed by the subjects of it. It has hitherto been understood that there can be no sovereignty exercised on the main sea or ocean; that the sea is the common road of the universe; that the law by which all transactions

* See a pamphlet entitled, de l'Etat de la France, à la Fin de l'an 8me a Paris, chez Henrics, rue de la Loi. This pamphlet is said to be written by Citizen Hauterive, who is employed by the French government in the Department of the Secretary of State or Foreign Affairs.

are there to be regulated, is the law of nations, that is, the law of nature, so far as it is applicable to the conduct of nations, and any particular conventions by which different states may have bound themselves; such at least are the principles which all eminent writers have hitherto acknowledged. If this sort of floating sovereignty were to be admitted, I wish to know in what manner piracy and murder upon the main sea are in future to be prevented or punished? Is it to be understood that the punishment of these crimes is to be confined, under this pretence of sovereignty, solely to the jurisdiction of the governments of those countries to which any such ship may happen to belong? I need not state what would be the necessary consequences of admitting this doctrine into any code of maritime jurisprudence.

The next principle which this French writer* endeavours to establish is of a still more extraordinary nature; he proceeds to say, "En tems de paix, la navigation de peuple à peuple est affranchie de toute de loi de prohibition: il n'y aura d'exception que relativement au cabotage d'un port à l'autre, apartenans au même pays, et à la navigation entre les colonies et leur metropole." This most presumptuous attempt to regulate the commerce of other countries, has indeed no reference to a state of war. In truth, it lays down a doctrine which is to govern all nations in their commercial intercourse during *time of peace:* It interferes with the exercise of a right which belongs to every sovereign upon earth; for it prescribes a rule by which its commerce and navigation shall in future be regulated. The writer, however, admits of two exceptions, which are in contradiction to the very principle advanced by him, and so far he clearly acknowledges the right of every sovereign to make regulations of this nature; for he is of opinion that this rule should not extend to the cabotage, or coasting-trade, from one port of any country to another port of the same country, or to the commercial intercourse between any country and its colonies. I cannot help observing, that these two exceptions apply to branches of commerce, with re-

* See the French writer last quoted.

spect to which alone the French Government has ever been able to make any restrictive regulations in their laws of navigation. It was once, indeed, the intention of their great minister, Monsieur Colbert, to adopt, with respect to the shipping in which the European commerce of France is carried on, regulations similar to those to which the commerce and navigation of Great Britain with the other countries of Europe are now subject; but he found on inquiry, that the mercantile vessels of France were not adequate to the carriage of the great quantity of articles in which that kingdom then dealt with other European nations, in consequence of the extensive trade already acquired under the protection and encouragement, by which he had successfully promoted the manufactures and general commerce of his country. He was convinced, therefore, that the commerce of France would be restrained and diminished, if he endeavoured in this manner to encourage and increase its mercantile marine; he relinquished, on this account, his design, preferring the interests of commerce to those of navigation. It is evident from hence, that the proposition now advanced is nothing less than a direct attack on the British laws of navigation, with a view to deprive Great Britain of an advantage which France is not qualified to enjoy. The principle on which these laws of navigation are founded, and which is thus attacked, is no less consonant to justice than to true policy; in its utmost extent, it goes no farther than to establish as a rule, that the trade between Great Britain and all the countries of Europe shall be carried on only in ships either belonging to Great Britain, or to those belonging to the country from which any article may be imported; and not to suffer Holland, or any other power, to derive an advantage, from becoming the carriers, in a commercial intercourse with other countries, in which they have no right to be concerned; such was the rule generally adopted in the law which was first enacted for this purpose in the middle of the seventeenth century, during the usurpation of Cromwell. When this law was re-enacted at the Restoration, some

modifications or exceptions were made, which subsist to this day.

This wise system of policy may be traced back to as early a period as the reign of Richard II., when two* laws were passed, founded on the principles before mentioned. It is not surprising that, during the civil wars, which prevailed for almost a century subsequent to the death of that unhappy prince, no further progress should have been made in extending and confirming this system; but as soon as the contest between the houses of York and Lancaster was at an end, by the accession of Henry VII. to the throne, it was immediately resumed by this wise monarch,† who expressly assigns as a reason for passing a law for this purpose,‡ that it was to "prevent the decay of the navy of the realm." Queen Elizabeth§ first assumed the right of confining the coasting trade of the kingdom to British ships only, and the system was brought to perfection by the famous act before mentioned, passed in the year 1651. I have given some account in the following discourse of the causes which induced those who then governed this country to pass this memorable law, and of the contest which it produced with the Republic of Holland, whose subjects thought they had a right to be the carriers of all the world, and to raise themselves, by the number of their ships and sailors, to a degree of maritime superiority, which it was not at that time easy to resist. It cost Great Britain many severe conflicts to affirm the right which she had thus asserted and established, and of which it is the intention of the enemies of this country to endeavour now to deprive her; all the laws which have since passed on this subject are merely in affirmance and support of the principles established in what is commonly called the Act of Navigation. This excellent system of laws has in truth been the foundation of the great naval power which this kingdom at present possesses, and on which her security depends. The reader will see, in the following discourse, the low state of the

* 5th Richard II., stat. 1, ch. 3. 14th Richard II. ch. 6.
† 1st Henry VII., ch. 8. ‡ 4th Henry VII. ch. 10.
§ 5th Elizabeth, ch. 5. sec. 8.

mercantile shipping of Great Britain previous to the passing of the act of navigation, on no less authority than that of Sir Josiah Child. All the world knows to what a degree of maritime pre-eminence Great Britain has gradually risen, by the operation and under the influence of the law before mentioned. By the last account that was taken of the British ships registered in the different parts of his Majesty's dominions, it appears that the number of mercantile vessels owned and navigated by British subjects, amounts to 17,295, that their tonnage amounts to no less than 1,666,481 tons, and that the number of men by which they are navigated, allowing at an average one man for every twelve tons, amounts nearly to 129,546 men. This is certainly the greatest mercantile marine belonging to one nation that ever existed in the world; it is the foundation and support of our military marine, and consequently of our naval power.

I am sensible of the absurdity as well extravagance of many of the claims which I have thus endeavoured to combat; but I thought it right that the people of this country should be apprized of the extent of these claims, and of the attempts that are now making to undermine and destroy that maritime greatness, which is the pride and glory of every Briton, who loves his country, and in which he trusts with confidence for security against France and all her allies; while many of the other nations of Europe are submissive and crouching to the power, which that republic has lately acquired by the success of her armies on the continent—

Cecidêre animi, nec jam amplius ARMIS,
Sed VOTIS, PRECIBUSQUE *jubent exposcere pacem.*
VIRGIL. ENEID. lib. 3.

I have said already, and will again repeat, that it is the intention of the enemies and rivals of Great Britain to sap the foundation of our naval power, because they are no longer able to resist it; they wish to diminish the sources of our maritime greatness, by obliging us to repeal our laws of navigation, and to restrain the full exercise of so much of it as they may think proper to leave

us, by forcing us to adopt a new code of maritime law. I am astonished that other nations are not sensible of the consequences which would naturally result from their success in this attempt, and that they should blindly contribute to place in the hands of the same government a decided superiority by sea as well as land, which would necessarily terminate, as it did, when Rome was at the height of its power, in the subjugation of mankind.

Independent of the arguments already adduced in support of the rights which Great Britain as a naval power claims to enjoy, there is one circumstance which ought to convince every reasonable man, that she has always acted, and still continues to act, upon the true principles of maritime law; for her conduct has ever been uniform, and her system always the same; while the other nations of Europe have of late years varied their systems, or at least their practice, as motives of policy or of interest have appeared to require. In all situations, whether neutral or belligerent, Great Britain has never departed from those principles which she now asserts; in a moment of great difficulty, when engaged in a war with her own colonies, and with France and Spain, though pressed by those governments who were parties to the armed neutrality of 1780, she never could be induced to renounce any one of her maritime rights, but, on the contrary, even then asserted them:* In two or three instances she has indeed consented to an express stipulation in her treaties with other powers, that free ships should make free goods, perhaps unadvisedly, but always in cases where her interests could not suffer from the concession: It is true also that France, as well as all the other powers of Europe, formerly acted upon nearly the same system: The ancient ordinances of France are upon the whole in conformity to those rules of maritime law which Great Britain now maintains; in one or two points only these ordinances establish regulations less liberal. But, from the time of the armed neutrality in 1780, France has thought

* See the Declaration of the Government of Great Britain to Russia of the 23d April 1780—to Denmark of the 25th July 1780—to Sweden of the 3d August 1780.

it right. from motives of policy, to pursue a different line of conduct. To gratify and allure those governments which were parties to that armed neutrality, France then first began to profess her attachment to what she called the freedom of navigation, and to declare that she would maintain the rights of neutral states, as they are announced in the declaration of the late Empress of Russia.* In the present war, those who have successively exercised the powers of government in France, have, in their conduct towards neutral nations, varied their system with almost every change of government; they have at no time, however, acted upon the principles of the armed neutrality before mentioned till of late, when, from obvious reasons, they are become zealous to establish the rules of that convention which has lately been signed by the northern powers. The merchants of the United States of America complain that they have been robbed, during the course of the present war, of nearly L. 5,000,000 of property by the outrageous conduct of the French cruizers, contrary to every principle of maritime law, and to the express stipulations of treaties; and, in a late negociation, the French Government has contrived to evade any stipulation or engagement for the present payment of this debt. In 1797, the rulers of France ordered that all neutral ships should be taken and condemned, in which were found *any British produce or manufactures;* and upon this principle they have continued to act till the present moment, when they have thought it for their interest to assume an appearance of moderation.

In Russia, the system which has prevailed, in practice at least, has also been contradictory to the principles asserted in the convention for an armed neutrality in 1780. The late Empress Catherine II. was of opinion, that any regulations of this description in favour of neutral commerce should not be extended to the subjects of the Ottoman empire, which she affected to consider not as a

* See the Answer from the King of France to the Declaration of the Empress of Russia, April 25. 1780.—See Declaration of the Empress of Russia to the Courts of London, Versailles, and Madrid, March 1780.

civilized state, and not entitled on that account to any privilege, contrary to the strict laws of war. For a reason something similar, she was also of opinion that the new rules of maritime law which she had adopted did not apply to the subjects of the lately established Republic of France, whom she termed miscreants, asserting that they had overturned all the duties which ought to be observed towards the Almighty as well as their sovereign, whom they had deprived of his crown and life; and for that reason the empress entered by treaty into engagements with the British Government, not only inconsistent with the convention of 1780, but of a directly opposite nature; in which treaty* it was stipulated that she would "*unite*" with us "*all her efforts* to prevent other powers not implicated in this war, from giving any protection whatsoever, directly or *indirectly*, in consequence of their neutrality, to the commerce or property of the French, on the sea or in the ports of France." And, in execution of this treaty, she sent a fleet into the Baltic and North Seas, with express orders to her admiral† to search all Danish merchant ships sailing *under convoy*; and as late as the year 1799, her son and successor, Paul I., acting upon the same principles, actually threatened the Danish Government with immediate hostilities on account of its partiality to France; one symptom of which he stated to be, that the Danes gave assistance and protection to the trade of France, under colour of the Danish flag: And the execution of these threats is said to have been prevented by the interference of Great Britain.

Sweden, another of these northern confederates, has been engaged in only one war since the signature of the convention for an armed neutrality in 1780, and yet according to the evidence of the Danish civilian, Dr Schlegel,‡

* See the Convention between his Britannic Majesty and the Empress of Russia, signed at London the 25th March 1793.

† See the instructions to Admiral Tchitchagoff, of 24th July 1793.

‡ See page 17 of the English translation of Dr Schlegel's work, before referred to.

the government of that country then violated the very system of neutral rights, which, as this Danish writer observes, it had heretofore "so laudably and valiantly maintained." And in a convention made between Denmark and Sweden in 1794, these powers declare "that* they do not claim any advantage which may not be clearly founded on all their respective treaties whatsoever, with the different powers at war;" and they also "reciprocally bind themselves to each other, and to all Europe, not to claim in such cases as are not expressed in treaties, any advantage that may not be founded on the universal rights of nations hitherto recognised and respected by all the powers and all the sovereigns of Europe." Now, in the treaties still subsisting between Sweden, as well as Denmark and Great Britain, there are express stipulations directly contrary to the principles established by the convention for an armed neutrality in 1780; and the principles of this convention, as well as of that lately signed, have not yet been "recognised by all the powers and all the sovereigns of Europe:"—They certainly have not been recognised by Great Britain.

If we wish to know the character of the Danish Government in commercial matters, we have it on the authority of the late Empress of Russia, Catherine II:† In her instructions to her admiral in the year 1793, she says, that the Court of Denmark, with its accustomed weakness, prefers ideal gain to the sound considerations of policy. The rescript, however, which the Government of Denmark published at the commencement of the present war, for pointing out to the Danish merchants the nature and limits of their neutral trade, expressly enjoins all Danish subjects not to attempt to carry in neutral ships any property belonging to the belligerent nations. No one can doubt that this injunction at least is directly contrary to the principles asserted in the armed neutrality of 1780, as well as in that lately signed.

I have already stated the substance of the convention

* See Articles II. and III. of the Convention between Sweden and Denmark of the 24th March 1794.

† See her instructions to Admiral Tchitchagoff.

between Denmark and Sweden in 1794; the engagements there taken bind Denmark as well as Sweden, and are certainly directly contrary to the principles of both the armed neutralities. But, notwithstanding all its professions, the Government of Denmark suffered Bergen and Christiana to be the regular stations for French privateers, which sallied out from thence to capture British merchantmen navigating the adjoining seas; and, in the ports before mentioned, a French consul was permitted to exercise maritime jurisdiction, contrary to the established usage and principle of maritime law, and to condemn the ships so captured. No less than one hundred British merchantmen were so condemned, and the remonstrances of the British Government to prevent this practice were of no avail. During the course of the present war the Court of Petersburgh has had frequent occasion to manifest its displeasure at the conduct of the Danish Government for having availed itself of every pretence to escape from the engagements which it had solemnly taken, not to permit its subjects to cover the property of the belligerent powers, under the colour of the Danish flag. At last, however, the Danish ministers gave this sort of commerce a more avowed support, by appointing a convoy for its protection.

It cannot but appear most extraordinary that the minister of Denmark, in the note delivered by him to Mr Drummond, on the 31st December 1800, should assert that the object of the Court of Denmark in signing the new convention for an armed neutrality lately concluded at Petersburgh, was nothing more than *a renewal of the engagements* which were contracted in the years 1780 and 1781, and which were then made known to every Court of Europe; and that the parties to this convention intended to re-establish those engagements in their *primitive form*, when it appears by a comparison of the two conventions, that an article has been inserted in the last of them which was not in the first, and which is certainly more hostile to the maritime rights of Great Britain than any of those claims which had hitherto been advanced, viz. "That the declaration of the officer who shall com-

mand the ship of war of the king or emperor, which shall be convoying one or more merchant ships, that the convoy has no contraband goods on board shall be sufficient; and that no search of his ship or the other ships of the convoy shall be permitted." This new claim, of not permitting ships to be searched that are under convoy, is perhaps the greatest innovation on the established system of maritime law that has hitherto been attempted; for, as before observed, it in effect annuls all maritime rights whatsoever, for no right of this description can be exercised by a belligerent power, if the right of search is to cease; and I believe I may assert, without danger of contradiction, that this extraordinary claim cannot be supported on the authority of any one eminent writer, or on any precedent recorded in any court of maritime jurisdiction. It cannot but appear equally extraordinary that the same minister should assert, that the engagements then contracting could not be considered as contrary to the previous convention entered into with Great Britain so late as on the 29th August 1800, when, by this last convention, his Danish Majesty engaged, in order to prevent similar *rencontres* to that which had so lately happened with the Danish frigate the Freya, to suspend his convoys, until "ulterior explanations on this point shall have effected a definitive convention." These ulterior explanations most clearly refer to a negotiation for that purpose with the British Government, and yet in the article of the convention, signed at Petersburgh before mentioned, this question is prejudged, and in effect decided, without the knowledge or consent of the British Government; and it is further stipulated, in the ninth article of this convention, "that if any of the contracting parties, on account of, or from dislike to, the present convention, or any circumstance connected with it, should be disquieted, molested, or attacked," the parties shall make it a common cause mutually to defend each other. And in the fourth article of the same convention, the parties agree to equip a number of ships of war, to enforce the rights claimed under this convention.

Such is the state of this business, according to the

papers which have hitherto been given to the public. If the Danish Government have any way of reconciling the apparent inconsistency (to use no harsher term) of its conduct on this occasion, it may fairly be presumed that, for its own credit, it would before now have given a satisfactory explanation.

With respect to the powers that have made themselves parties to the convention for an armed neutrality, lately signed at Petersburgh, I have only to add, that the court of Berlin, in a treaty signed at Mayence, on the 14th July 1793, engaged to "unite all its efforts to prevent other powers, not implicated in the war, from giving, in consequence of their neutrality, any protection whatever, directly or *indirectly*, to the commerce or property of the French, on the sea, or in the ports of France."

There were treaties with other powers of Europe, similar to that last mentioned.

It is evident from the foregoing deduction, that Russia and Sweden, in the wars they have waged since they concluded the convention for an armed neutrality in 1780, have not conformed to the principles therein established, and that all the powers who were parties to this convention have renounced and abandoned, by solemn treaties, the principles of that convention, at least during the continuance of the present war. It is proper to observe, that all the treaties by which the principles of the armed neutrality are so renounced, are now in existence, unless it is alleged that one party to a treaty is at liberty at any time to annul it without the consent of the other.

It may fairly be presumed, that these northern powers never entertained a thought of re-establishing and again asserting the principles of the armed neutrality of 1780, till they were instigated by the enemies of this kingdom to direct this blow against its clearest rights, and against the exertions and interests of the navy of Great Britain. For it is singular, that all neutral powers, except the United States of America, have passively acquiesced in the many violent and outrageous acts, which, during the present war, the Government of France has from time to time exercised against their commerce. They never made

any resistance, and the public at least are not informed that they ever made any remonstrance. It does not appear, that the Court of Denmark, in particular, ever made any representation against that most unjust and violent decree, by which the French Directory, in the year 1797, directed that all neutral vessels on board of which British manufactures should be found, whether the property of enemies or neutrals, should be condemned.

In the year 1798, when the same Directory first projected the invasion of Egypt, they seized upon more than a hundred neutral vessels, then in the ports of France, without which they could not have transported their army to Alexandria; it does not appear that any of the neutral powers, who suffered by this injury, ever made any representation against this flagrant violation of their rights.

It happened, however, that soon after the ever memorable victory of Aboukir, when Lord Nelson with his fleet blocked up the port of Alexandria, a Danish merchantman was detained, in consequence of this blockade, in that port. Though this detention was the necessary consequence of war, and justified by immemorial usage and practice, the Danish Government was not restrained by any sense of justice or decorum from directing its minister in this kingdom to make a formal application for the release of this ship, as well as for full compensation for the loss sustained by her detention; or, in case of total loss, a sum of money equal to the full value of the vessel and cargo.

It is clear therefore that these neutral powers, who so patiently acquiesced in every arbitrary proceeding of the enemies of Great Britain, have always been ready to pour forth their complaints against every act of the British navy, however justified by the laws of war; and that their jealousy and hostility are in fact solely directed against the naval power of this country.

. But whatever may be the intentions or the conduct of these neutral powers, it would indeed be strange if, after a war of more than nine years' continuance, in which the officers and seamen of the British navy have distin-

guished themselves even in a greater degree than in any former war, and have destroyed, or at least so far reduced, the fleets of almost all the enemies of this kingdom, that they dare not meet the British squadrons in open conflict, and their merchants can no longer carry on in security any commerce on the ocean; I say it would indeed be strange, if the Government of Great Britain should choose such a moment voluntarily to consent to any regulations, which should in the least degree diminish the force, or discourage the exertions of a navy, to which it is indebted for its security, and for the glory resulting from its victories. I repeat, it would indeed be strange, if, at a moment, when the enemy has reduced almost every other power to such terms of peace as he has thought fit to dictate, and is thereby at liberty to direct all his force against Great Britain, the Government of this country should submit to have shackles imposed on the efforts of our gallant officers and seamen, on whom our security, in such a crisis, must principally depend. I am fully persuaded, that if the enemy should be able to land on our coasts any part of the numerous armies, which for want of other employment he can now so well spare to invade this kingdom, the British army will fully discharge its duty, and the British people will rise, almost to a man, in defence of their country;—but it is certainly of the greatest importance, that we should be able, by the superiority of our naval force, to prevent any such invasion, and that, having two means of defence, we should in no respect weaken that in which we principally excel; and that instead of suffering this happy island to become in any degree the seat of war, we should preserve it, as it has hitherto been preserved, in a state of internal tranquillity,—carrying on and extending its commerce, and exercising and promoting all the arts of peace, as if no war even existed. In the course of the present war, experience has fully shewn what is to be expected from the tender mercies of a French army, wherever it has once gained a footing; especially when it is remembered, that the commanders of these armies have taught them to draw the whole of their pay, as well

as their subsistence, from the conquered countries, as those of Rome did in ancient times.

But it is not the security of Great Britain only, and of all its external dominions, which principally depend on the superiority of the navy of this country; it is no less for the interest of other nations, that Great Britain should retain its present naval superiority, and that it should not be transferred to the navy of France. I must on this occasion revert to an idea which I have slightly touched already;—if the power of the French Republic should become predominant at sea, as it is now at land, there will, in my judgment, soon be an end of the liberties of mankind. The armies of this enterprizing republic have hitherto been but too successful: they have extended the boundaries of what they properly call their territories, to the Alps on the south, and on the east to the Rhine, through the whole of its course: They have subdued the spirit at least of the German empire; the head of that empire has told the Diet,* in terms sufficiently explicit, that he can no longer afford it protection, and that the several states must convey their complaints to the Government of the French Republic, manifesting thereby, that it is on the decision of that government, that their future existence and situation, whatever it may be, must depend: The king of Prussia, the only prince of the German empire who still commands any considerable force not yet subdued, having by the fatal policy which dictated the treaty of Basle obtained a short but precarious respite, is now more exposed than ever, by the subjugation of Austria and all its co-estates to the south; and the successor of that great monarch, who once resisted the power of France, Austria, and Russia united, being now left to himself, and controlled by the power of France and Russia, now acting perhaps in con-

* See the Note of the 12th February, addressed to the different states of the empire, from the Chancery of State at Vienna: The words are, "mais s'il arrivait que le resultat ne fut pas conforme à ses desirs ce seroit le consequence des circonstances defavorables dans lesquelles il se trouve, et les etats qui croiront avoir lieu de se plaindre, devront s'adresser directement à la Republique Francaise."

cert, no longer finds the safety which he expected to derive from his neutrality: The French Republic, equally politic as enterprizing, has been careful to surround itself with smaller states, most of them of its own creation, and which are wholly directed by it: As Flanders is now become a part of the French territory, so Holland is in effect governed in such a manner as France thinks proper to direct; and the French armies, under pretence of affording it protection, are in truth masters of the country: The whole of Switzerland is formed into a republic, governed by French agents or pro-consuls; and that once warlike country, long the seat of liberty, and the barrier of Italy against French invasion, is absolutely at the disposal of the French Republic: The adjoining parts of Italy are formed into subordinate republics, according to the French model, and totally under French influence and direction; and every state of Italy to the south, continues to subsist under such form alone, and subject to such conditions as the French Government thinks proper to prescribe: The Spanish Government is wholly under French direction, and there is at present hardly a state in Europe which is not exposed to its influence, and apprehensive of the effects of its power. If it be asked, What has at present prevented the further extension of the French conquests? I answer, not its moderation, for when was moderation to be found in a military republic, governed by adventurers of talents and activity, who must persist in the same course, to maintain their character, importance, and situation? The French Government may have suspended its conquests, because it is apprehensive perhaps of difficulties in the present moment, in attempting to penetrate further; or it may have suspended them only in one quarter, in order to direct their force to other objects: If France, however, should once become superior at sea, as well as at land, and the protection now afforded by the British navy should be removed, there would in such case be no maritime town or country, which would not be exposed to its attacks, and in danger of being subdued.

In such a state of things, what sort of maritime rights

the French Republic would think proper to establish and exercise, I leave to the determination of those who have read the foregoing pages, and who know how to appreciate the nature and character of a government like that of France. I repeat, therefore, with confidence, that it is not the security of Great Britain alone, which depends on the valour and superiority of the British marine, but that the fleets of Great Britain are now the principal bulwark, of all that yet remains of national independence in the world. It appears to me, therefore, incontrovertible, that these Northern Powers, who are now aiming at the subversion of the naval superiority of Great Britain, and are endeavouring to transfer it to France, are acting as much in contradiction to their own interests, as to those of this country. I know there have been even British statesmen, who have been willing to relinquish those maritime rights, which I have endeavoured now, as well as through the whole course of my political life, however feebly, to defend; but I trust that on due consideration, they will be induced to alter their opinions: At all events I know, that, in the present crisis, we may place in a vast majority of the people of Great Britain that confidence to which, from their good sense and spirit, they have always shewn themselves fully entitled:—I am persuaded, that they will support to the utmost the just rights of the navy of Great Britain, to the exertions of which they are indebted, not only for their happiness, safety, and independence, but for the national glory which now surrounds them, and for the high character, which their government holds in the estimation of mankind.

ON THE CONDUCT

OF THE

GOVERNMENT OF GREAT BRITAIN.

1758.

It is unhappy for the race of mankind, that those collective bodies into which it is divided, should be subject to the same passions and animosities, as the individuals of which they are composed, and not have, like them, some visible superior tribunal, which might hear and compose their dissensions: this might perhaps prevent those appeals, which are too frequently made to the sword; where the events of war alone decide the cause, and the sentence, which passeth on the transgressor, brings also to the injured party a large share of misfortunes, in the execution of it. The welfare of mankind however requires, that this necessary evil should be confined within the narrowest bounds; and that a trial, where the proceedings are so destructive, should be made as short, and as equitable, as the nature of it will admit: it is the du-

ty therefore of all those who are not called upon by some just motive to concern themselves in the dispute, to be extremely attentive to their conduct, that they may not thereby contribute to render the contest unequal: As far as man is concerned, it is force alone, on which the decision depends; to add therefore by any means to the power of one party, is manifest injustice to the other, and besides is highly injurious to the rest of mankind; since it necessarily tends to spread discord among nations, and from a single spark of contention to light up a general flame.

It might be hoped, that a duty like this, enforced by such powerful motives, would be universally observed; and that no private inferior interest could induce any power to transgress it: If some little profits, the object of greedy individuals, should perhaps arise from the violation of it; can a nation in general reap a benefit, where public justice receives a wound? To act in opposition to this in hopes of some present advantage, is to establish a dangerous example, which may hereafter prove injurious to ourselves; it is to untie the only band, which holdeth nations happily together, and to banish mutual confidence from the various communities of the world.

Such, however, hath been the mistaken conduct of some neutral states during the present war.—France consented to the treaty of Aix-la-Chapelle, that she might the more securely pursue the objects of her ambition; and that, under the disguise of peace, she might extend and fortify her possessions, in a part of the world where her arms, in time of open war, had

always, till then, been unsuccessful: for this purpose she had artfully contrived, that the American rights should not be determined by that treaty, but be left to the consideration of commissaries, to whose decisions she never meant to pay any regard.—Canada was her vulnerable part; this, therefore, she resolved first to strengthen, and then to enter again, with more confidence, into war. While we were employed in debating our rights, she took more effectual means to end the contest in her favour; she sent frequent supplies to America; she seized and fortified the passes and navigable rivers of that country, drove the English from their possessions, and built forts on the dominions of Great Britain. When the design was thus far advanced, England saw it in all its terrors, and with spirit determined to support her just rights: though forsaken now, in her distress, by those allies who owe their independency to her protection, she feared not, in such a cause, to stand alone against all the efforts of France; she sent forth her naval strength, but the enemy soon rendered the attempts of that ineffectual, by resolving never to try its force. In what manner was she now to employ it? One only object remained worthy of its attention, and that was to destroy the trade of the enemy, and to intercept the succours which she sent to her dominions in America. Though this would not crush at once the evil, it would stop at least the sources that fed it, and might in the end contribute to induce the enemy to consent to a reasonable peace.

France endeavoured again to obviate this stroke by

her policy. She took off the tax of 50 sous per ton, which she always chuses to keep on foreign freightage; she opened even her American ports, and admitted other countries to that choice part of her commerce, which, by her maritime regulations, she hath at other times so strictly reserved to herself. Neutral nations seized at once on the advantage, and opened to the enemy new channels for the conveyance of those riches, by which the war was to be nursed and protracted. Under the banner of friendship, they thus served the cause of the adversary, whose wealth, secured by that protection, would have passed safe and unmolested through our fleets; if Britain, again raising her spirit, had not resolved that by this means her naval power should not be rendered useless, and seized on the property of the enemy which she found on board neutral ships. It is well known, however, that her conduct in this respect hath not been universally approved, and that some neutral nations think they have a right to carry in their vessels unmolested the property of our adversaries. As I here differ with them in sentiment, this is the point on which I intend to discourse.

Great and wise governments have always been jealous of national glory. It is an active principle, which, properly cultivated, operates in virtuous actions, through every member of the state; to preserve this, therefore, in its purity, is the duty of every one who loves his country. Can it then be wondered, that the native of a kingdom, always celebrated for its public spirit, and its upright faith, at a time when

these are called in doubt, should interest himself in its defence? No indecent charges shall here be urged against other countries; it is meant only to vindicate the honour of our own. It is to be lamented that the necessity of affairs should at such a season have given occasion to this dispute, particularly with that ancient ally of England who hath so often fought with her under the same banner, in support of the just rights and privileges of mankind. The zeal of any government to encourage the industry of its people, is what a British pen can never disapprove; the principle is noble, and merits even our applause, I only mean to shew that the present object of it is not just.

I shall therefore examine the right which neutral powers claim in this respect, first, according to the law of nations, that is, according to those principles of natural law which are applicable to the conduct of nations, such as are approved by the ablest writers, and practised by states the most refined. I shall then consider the alterations which have been made in this right by those treaties which have been superadded to the law of nations, and which communities, for their mutual benefit, have established among themselves.

The right of protection, then, must have its foundation in some law, and when considered in relation to any particular case, it must be founded on that law by which the interests of the parties concerned are generally determined, and which hath force in that place where the right of protection is claimed. Thus, in the present case, if neutral nations have any

right to protect the property of the enemy, it must take its rise from those laws which are the established rules of conduct between nations, and particularly on that element where this right is supposed to be exerted. No civil or municipal institutions, and much less the privileges arising from them, can here take place; they have no force but under the dominion of those who agreed to their establishment. The question then is, How far, according to the law of nations, doth this right of protection extend? To answer this clearly, we must observe, that governments can have succeeded to no other rights but such as their respective members enjoyed in a state of individuality; and that one nation is now to another as it were in a state of nature, that is, in the same condition in which man was to man before they entered into society; the right, therefore, of protection, which individuals would have enjoyed in such a situation, is the same which governments can claim at present. An individual, then, in a state of nature, would have had an undoubted right to protect his own person and property against any attack; but if I am engaged in contention with another, would he in such case have had a right to protect him against me? most certainly not, since he would thereby deprive me of a right which the law of nature, for my own security, would in this case give me, of seizing the property of this my enemy, and destroying his person. If he thought my conduct manifestly injurious, so as to call for general resentment, he would on that account become my enemy himself; but as long as he calls himself a

neuter, to act in this manner against me, would be no less absurd than unjust: such, therefore, and no more, is the right of protection which governments enjoy at present in those places to which their own dominion doth not extend; they have succeeded to the rights only of their respective members, and by consequence these alone they can protect.

But, it will be asked, from whence then arises the right which governments always enjoy of protecting the property of the enemy within the precincts of their own country? It is a consequence of the right of dominion; unless, therefore, their dominion extends over the ocean, the right of protection cannot there take place. Dominion gives a right of enacting laws, of establishing new jurisdictions, and of making all (whether its own subjects or those of other countries) submit to these, who come within the pale of its power; here, then, the trial, which the law of nations gives, is, as it were, superseded, and any proceedings upon it would of course be unjust; but as soon as you are out of the verge of this particular jurisdiction, the laws thereof, and the privileges which attend them, cease at once, and the general laws of nations again have their force. Here the property even of an ally hath no other protection than what these laws allow it; being joined, therefore, to the goods of an enemy, it cannot communicate its protection to these, since the same law, which gives security to the first, allows you to seize and destroy the atter. These reasonings are exemplified by a common fact;—within the precincts of the dominion of any

government you are not at liberty to search the ships of any country; but is not this liberty universally and immemorially practised over all on the main sea? and wherefore is this search made, but that, according to the law of nations, all are here answerable for what they may convey.

There is something analogous to this in most civil governments. Few countries are without some places which enjoy a right of protection from the general laws of the state, such as palaces, houses of religion, and the like; and this right generally arises from some pretence to an exclusive jurisdiction. As long, therefore, as any particular property remains within the verge of these, however justly it may be the object of the law, it is not subject to the power of it. But suppose it conveyed from hence into the public roads, beyond the precincts of this particular palace or convent; the protection it received would vanish at once, and the general laws of the community would fully then have force upon it. Thus the protection which governments can give within their dominions extends not to the sea; the ocean is the public road of the universe, the law of which is the law of nations, and all that pass thereon are subject to it without either privilege or exemption.

If this manner of reasoning should not clearly establish my point, I can appeal in support of it to the ablest writers on public law, who will be found to have decided the question in my favour.

And, first, I will produce the testimony of that learned native of Delft who wrote so nobly on the

freedom of navigation to serve his ungrateful country. In one of the passages which are now before me, it is remarkable, how much he labours to give the greatest extent to the rights of commerce, and yet, with all his laudable bias to this favourite point, he is clearly of opinion that the ship of a neutral nation cannot protect the property of an enemy; he manifestly implies,* that the vessels even of allies are subject to condemnation, on account of the enemy's property, with which they are laden, when it appears that this property was put on board them with the consent of the owners of the vessels, but not otherwise. His words are, "neque amicorum naves in prædam veniunt ob res hostiles, nisi consensu id factum sit dominorum navis;" and producing several authorities in confirmation of this opinion, he afterwards adds, "Alioqui res ipsæ solæ in prædam veniunt;" but if the enemy's property should be found laden on board a neutral vessel, without the connivance of the owner, in such a case, "that property alone is lawful prize." And speaking again, in another place, on this point, he says, that if the wrong done me by my enemy is manifestly unjust, and that any one, by affording him succours, should encourage him in his enmity against me, "jam non tantum civiliter tenebitur de damno, sed et criminaliter, ut IS, qui judici imminenti reum manifestum eximit."† A fine and animated manner of expression, which shews how clear the opinion of this great author was upon the question.

* Grotius de Jure Belli et Pacis, lib. 3. c. 6. sec. 6. in notis.

† Ibid. lib. 3. cap. 1. sec. 4.

To the testimony of Grotius I shall add that of Bynkershoek, a native also of Holland, and whose sentiments in point of maritime jurisprudence Barbeyrac often prefers even to those of the former; and what makes his opinion at this time of great importance, is, that he wrote principally for the use of the courts and states of the United Provinces, and generally confirms what he advances, by their judgments and resolutions. He speaks expressly in favour of my point. "Ratione consultâ," * says he, "non sum qui videam, cur non liceret capere res hostiles, quamvis in navi amicâ repertas, id enim capio, quod hostium est, quodque jure belli victori cedit." "Upon attending to all the reasons which occur to me on this point, I cannot discover why it should not be lawful to take the property of an enemy, though found on board the ship of a friend; for I take that only which belongs to the enemy, and which, by the rules of war, is always ceded to the captor." He then assigns this reason also for his opinion, that as it is lawful to stop on the ocean any vessel, though she carry the colours of a neutral nation, and to examine, by her papers, to whom she really belongs; and in case she appear to be the property of an enemy, to seize her as lawful prize; so he can see no cause why this rule should not extend to the effects which any ship may have on board; and, if the goods of an enemy should lie there concealed, why they also by the right of war should not be taken and condemned: he even declares it to be his opinion, that the owner of the neutral

* Bynkershoek Questionum Juris Publici, lib. i. cap. 14.

vessel should in such a case lose the price of the freight; a severity, which the English Courts of Admiralty never practise, where some particular circumstance doth not require it.

I shall add to these the opinion of Albericus Gentilis, esteemed the ablest writer on national jurisprudence, till Grotius bore the palm from him; and his fame in this respect was so great, that Philip III. of Spain appointed him perpetual advocate for his subjects in all causes which they might have depending in the courts of England. This author states a case, where the Tuscans had taken the effects of the Turks, at that time their enemies, which they found on board some English ships; and he determines, that the Turkish goods are legal prize, but that the captor must pay the freight to the English. "Transeunt res," * says he, "cum suâ causâ, victor succedit in locum victi, tenetur etruscus pro toto naulo." The property of the enemy passeth to the captor, but all its consequences attend it; the goods justly belong to him, but he must pay to the freighter all, which the enemy would have paid, to whose right he hath in every respect succeeded.

To enter particularly into the sentiments of any more writers on this subject, would be equally tedious and unnecessary; it will be sufficient to mention the names alone of such others as are in favour of the question.—Among these I find Heineccius,† no less

* Albericus Gentilis De Advocatione Hispanica, lib. i. cap. 28.

† Heineccius de Navibus ob Vecturam Vetitarum Mercium Commissis, cap. 2. sect. 9.

famed for his knowledge of laws, than for his learning in what are the best expositors of laws, the antiquities of governments,—Zouch,* who for may years presided in the Court of Admiralty of this kingdom,—Voet,† —Zuarius‡,—and Loccenius,§ all of them writers of reputation, and whose opinions are universally relied on by all who treat on public jurisprudence.

I might indeed have wholly omitted the sentiments of these learned individuals, since we shall find, that great communities themselves have confirmed our opinion both by their laws and by their practice. It will not be proper on this occasion to look far back into the early annals of the European states. When the government of these were yet in their infancy, the advantages of commerce were but little understood, and of course the rights of it were not sufficiently regarded; war was then too much the season of rapine, and they, who entered into it, meant less to conquer than to plunder. As soon, however, as some better order began to be introduced into these affairs, it then became usual for each party at the commencement of the war to publish a declaration, wherein he specified what kind of trade he would permit neutral nations to carry on with his enemy; and these regulations were sometimes attended to, and sometimes not, either as the interest of the party-neutral inclined him to submit to the restraint, or as the power of the

* Zouch de Judicio inter Gentes, pars 2. sec. 8. cap. 6.

† Voet de Jure Militari, cap. 5, n. 21.

‡ Zuarius de Usu Maris, consil. 11. n. 6.

§ Loccenius de Jure Maritimo, lib. 2. cap. 4. n. 11.

party-belligerent enabled him to enforce the execution of it. True it is, that the prohibitions, which these declarations contain, are various, according to the sentiments of the different governments which made them; and, on that account, they are perhaps too unsteady a foundation on which to establish a right; there plainly, however, follows from hence one powerful inference in our favour, that not one can be found amid all this variety, which ever permitted neutral nations to protect the property of the enemy: This branch of freightage they all agree unanimously to prohibit.

The free states of Italy cultivated first the interests of commerce; before any vessel had as yet passed the Cape of Good Hope, and a shorter passage had been discovered to the East Indies, Venice and Genoa drove the principal trade of the world, and dispersed the manufactures of Asia to the different parts of Europe; it naturally followed, that these two commercial republics soonest understood and defined the just rights of navigation; their maritime constitutions still remain collected in the Consolato del Mare; and the reputation of these were so great, that as the laws of Rhodes were once to the Romans, and the laws of Oleron to the western parts of Europe, so these Italian laws became of force universally to all the nations which bordered on the Mediterranean Sea: These have determined the point expressly in our favour; in one of them it is asserted, "Se la nave o navilio, che pigliato sará, fusse di

amici, e le mercantie, che lui porterá, saranno d'inimici, lo armiraglio della nave o del navilio armata, puo forzare & constringere quel patrone di quelle nave o di quel navilio, che lui pigliato haverá, che lui conquella sua nave gli debba portare, quello, che di suoi inimici sará;" "If the ship or vessel, which shall be taken, belong to an ally, and the merchandise, which she has on board, belong to an enemy, the captain of the armed ship may force or constrain the master of the ship or vessel, which he has taken, to carry into some port for his account, the effects of his enemy which are on board;" and it is afterwards added that the master of the vessel must be paid for the freightage of the goods of the enemy.* And such was not only the constant purport of their laws; but the practice of their governments was always conformable to it. Their historian† tells us, that, in the war between the Venetians and the Genoese, the ships of Grecians, who where neuters, were always searched, and the enemies, who lay hid in them, were taken out, and made prisoners.

It is unnecessary to dwell longer in giving a further detail of the conduct of every nation in this respect; I will therefore confine myself to those who are most concerned in the present dispute; and will shew, that as England claims no more at present, than what she always enjoyed, so France and Holland have constantly supported the same opinion, whenever their interest required it.

* Il Consolato del Mare, c. 273. † Nicep. Grogoras, lib. 9.

It was in the reign of the first Edward, a prince who thoroughly understood the rights of his crown, and had a spirit equal to the support of them, that Philip the Fair of France, being engaged in a war with the Duke of Burgundy, the French admiral took the ships of several neutral nations, which were passing through the British Channel into the ports of Flanders: great complaints were made on this head, and commissioners were appointed to examine into the conduct of the admiral; a libel was there presented against him by almost every trading nation of Europe; the record * of this is still remaining; and if neutral nations had at that time pretended to enjoy the right of protecting the property of the enemy, and that the effects, which they carried on board their ships, could in no case, except in that of contraband, be made lawful prize; we might well expect that this right would here have been claimed and asserted: fear could not in this case have prevented it; for all the world, except France, was on one side of the question; but the record contains no such claim: the injured demand their right on a different principle, because the ships were taken on those seas, "where the kings of England (saith the record) have, time out of mind, been in peaceable possession of the sovereign lordship, with power of appointing laws, of prohibiting the use of arms, of giving protection, as occasion should require, and appointing all things necessary for the maintaining peace, justice, and equity, among

* Sir Edward Coke's Fourth Inst. chap. 22.

all, as well foreigners as natives, who navigate those seas."* Here, then, the right of protection is placed on that basis, on which alone it can properly be founded, —the right of dominion; no other pretence is offered; and if I may be allowed to sum up the evidence, as their names are written in the record: "Genue, Cateloigne, Espaigne, Alemaine, Seland, Hoyland, Frise, Denmarch, Norway, et plusours aultres lieux del empier," all join here in asserting the principle, on which I first established my argument.

The annals of Edward III. afford still other facts in favour of my opinion: this prince added to his military accomplishments great sagacity in the science of laws, and uncommon attention to the commercial interests of his kingdoms. In the second year of his reign he confirmed the charter of privileges, which some of his predecessors had before granted to foreign merchants, and particularly to those of the Hanse Towns,† who were at that time the greatest freighters of the western parts of Europe: this instrument may well be considered as a sort of maritime regulation, by which England meant to direct her conduct at that time in affairs of this nature: In this, liberty of navigation is fully confirmed; foreign merchants are allowed to carry their goods, whether purchased within the kingdom, or without, "Quocunque voluerint;" but with this exception, "præterquam ad terras notoriorum et manifestorum hostium regni nostri;" ‡

* See all this more fully stated in the record.

† Rymer's Fœdera, tom. 4. p. 361. ‡ Ibid. p. 516.

and some offences being afterwards committed against this charter in the succeeding wars, it was again renewed in the same manner in the sixth year of this reign. In both these instances the exception is express, that no trade whatsoever should be permitted with the enemy; but this good king, perhaps through a principle of justice, and his ardent love to commerce, seems to have practised this right with more moderation, that is, in much the same manner, in which the government of England claims it at present: for in his wars with Scotland, some ships of Great Yarmouth having taken several vessels belonging to the burgesses of the town of Bruges, "Prætendentes bona in iisdem existentia fuisse hominum de Scotiâ;" he directed his precept to the sheriff of Norfolk,* commanding him to set at liberty, and to cause full restitution to be made of the ships, and of such of the goods as belonged to the merchants of Bruges; and that he should detain only that part of the cargo, which was the property of the Scotch, his enemies. We find also, that when Queen Elizabeth was engaged in war with Spain, she seized several vessels of the Hanse Towns, which were entering into the port of Lisbon; and she urged among other arguments the charter above mentioned in defence of her conduct; she was in this respect so satisfied of the justice of her cause, that the threats of the German Empire and other neutral powers could not oblige her to relinquish her right; and though she

* Rymer's Fœdera, tom. p. 328.

might perhaps on this occasion give too great extent to it, yet it is remarkable, that Monsieur de Thou, who was himself a great lawyer, and had long sat in the first court of judicature in France, even, when he blames the conduct of the queen in this affair, passeth his censure upon it not as defective in justice, but only in policy: "In tam alieno tempore," says he,* "rerum prudentiores existimabant, imprudenter factum esse a reginâ et ab Anglis."

We have as yet mentioned the conduct alone of those English Princes, who knew how to assert their rights, and who ruled their people with glory; but we shall find that even under a weaker government, and in a later period, this right of seizing the property of the enemy found on board neutral ships hath been fully claimed and practised: When Villiers Duke of Buckingham presided over the naval affairs of England, and to gratify his own private resentments had engaged his country in a war against Spain, the British fleet under Pennington took several French vessels, to the number of between thirty and forty, which had Spanish effects on board; they were brought into the ports of England, and our Courts of Admiralty condemned the goods of the Spaniards, as legal prize, but ordered the vessels of the French to be released, and the freightage to be paid to them. This conduct was avowed by the court of England, and a full representation of it transmitted by the Lord High Admiral to the administration of France: about fifteen

* Thuanus, lib. 96.

years after this, when the French themselves were a war with Spain, the navy of France took a great many English ships, which were laden with the property of Spaniards; and their Courts of Admiralty condemned not only the enemy's effects, but the English ships which conveyed them: the Earl of Leicester, then ambassador in France, made great complaints on this head; he was answered that the English always acted in the same manner; and this reply being transmitted to the Earl of Northumberland, at that time Lord High Admiral, he consulted upon it Sir Henry Martin, the best English civilian of that age, and the most versed in maritime jurisdiction; and by his advice he returned to Lord Leicester the following answer, which at the same time proves the constant opinion, and shews the moderation of the British Admiralty on this point: "That," says he,* "which is alledged by the French to be practised in our Court of Admiralty, is absolutely denied; and that neither the law nor practice hath ever been here to confiscate the goods of friends for having enemies' goods among them: we are so far from doing any such act of injustice, as when in time of war we have met with any such prizes, the freight hath always been paid by the taker for those enemies' goods that he took, and those that belonged unto friends, were duly restored to them."

Thus much may suffice to shew the conduct of the

* The Sidney papers, Algernoon Earl of Northumberland to Robert Earl of Leicester, Nov. 5. 1640.

people of England. History will also prove to us that Holland hath always exerted the same right: At the beginning almost of that war, which the United Provinces sustained in support of their liberties, and even before their sovereignty was as yet fully established, the people of Zealand scrupled not to carry into their ports all such neutral vessels * as were conveying the effects of the enemy, under pretended names, from Flanders into Spain; and the Courts of Admiralty of that province adjudged the Spanish property to be legal prize; and though they released the neutral ships, they made them no compensation for the freightage; among these there were some English vessels, and Queen Elizabeth, angry that so young a State, and one which had placed itself under her protection, should in any degree interrupt the commerce of her people, at first shewed the effects of her resentment, by seizing their ships and imprisoning their merchants. The Zealanders upon this made reprisals; several English vessels were detained, and their commanders put under confinement. To endeavour at some settlement of this affair, the Queen sent over to Holland Mr Robert Beal, her secretary; and for the same purpose, the Prince of Orange despatched a minister to London. By these means, the dispute at last was compromised; the ships and the prisoners were on both sides released; but the Queen never obtained the restitution of the enemy's goods, which were taken on board the vessels of her subjects. This

* Historia Belgica Metereni, lib. v. Cambden, anno 1575. Zouch. de Judicio inter Gentes, pars 2, § 8. c. 6.

fact is worthy of observation, not only as it relates to the conduct of Holland, but as it shews how far a Princess thought herself obliged in equity to yield, whom historians have always described as positive in her temper, and, whenever her right was concerned, of a very tenacious disposition.

Holland, whenever she was engaged in war, almost constantly pursued the same conduct; she sometimes even prohibited the commerce of neutral nations beyond all justice and moderation. In the year 1599,* when the government of Spain first prohibited the subjects of the United Provinces from trading to the ports of that kingdom, a liberty which had unaccountably been allowed them from the commencement of their revolt to that period, the States-General, in revenge, published a placart, forbidding the people of all nations to carry any kind of merchandise into Spain. The words of Grotius, in the relation he has given of this affair in his Belgic history, are very full and express: "Per edictum (says he) vetant populos quoscunque ullos commeatus resve alias in Hispaniam ferre; si qui secus faxint, ut hostibus faventes vice hostium futuros." This placart they publicly notified to all kings and nations, for this reason, as the historian expresses it, "Ne quis inscitiam excusaret." The consequences of this notification deserve also our attention; the historian continues, "Paruit rex Galliæ, ac si quis suorum sex intra menses in Hispaniam navigaret, professus est privatum periculum fore." Henry IV., at that time king of France,

* Grotii Historiarum, lib. viii.

though delivered then from all his distresses, and arrived at the summit of all his power, scrupled not to submit to this placart, and gave up the interests of all his subjects who should attempt, within six months, to transgress it. The historian concludes, " Cæteri (reges) silentio transmisere;" the other powers of Europe made no clamorous complaints against this measure of the States; in silence they passed it over. How unlike was this conduct to that of Holland at present! Charles II., in a letter to the States-General, of October 4. 1666, charges them also with a remarkable violence of the same nature. Being at war with some Asiatic princes in the East Indies, they seized all the ships and goods of the English merchants which were trading to those countries; and the Dutch governors scrupled not openly to profess in their declarations, " Qu' ayant depuis peu annoncé la guerre aux princes, avec qui ils avoient dessein de trafiquer, cette guerre devoit par consequent leur interdire tout commerce avec les dits princes." *

I omit citing many other instances of their conduct in this particular, lest I should appear tedious, especially as one fact still remains, which is alone sufficient to evince the opinion of Holland on this point; and which I the rather chuse to mention, as it happened even after the Dutch had by their negotiations endeavoured to establish, as a general maxim among nations, that the goods of an enemy under a neutral banner should pass unmolested. At the commencement of that war which broke out immediately

* Charles II.'s Letter to the States-General, Oct. 4. 1666.

after the Revolution, when the first grand alliance was formed against France, Holland entered into a convention * with England, to prohibit totally the commerce of neutral powers with the enemy. In the preamble of this, they assign publicly their reasons for it. They say, " that having declared war against the most Christian king, it behoves them to do as much damage as possible to the common enemy, in order to bring him to agree to such conditions as may restore the repose of Christendom ; and that, for this end, it was necessary to interrupt all trade and commerce with the subjects of the said king ; and that to effect this, they had ordered their fleets to block up all the ports and havens of France ;" and afterwards, in the second and third articles of this convention, it is agreed, " That they would take any vessel, whatever king or state it may belong to, that shall be found sailing into or out of the ports of France, and condemn both vessel and merchandise as legal prize ; and that this resolution should be notified to all neutral States." Such, therefore, was at this time the avowed opinion of Holland, and England was induced to join with her in this convention, exceeding thereby those bounds of equity and moderation which she had almost always practised in this point before, and which she will, I hope, most faithfully observe for the future. The northern crowns, who were particularly affected by this prohibition, contended very vehemently against it. In answer to their objections, were urged the circumstances of

* Convention concluded at London, August 22. 1689.

affairs, the danger of Europe, and the mighty strength of that ambitious power, which, if some extraordinary effort was not made, would bring mankind under its subjection. It is remarkable, that Puffendorf, * who owed his fortune and employments to one of these northern crowns, was of opinion in this case against them, and thought that the convention might be justified. It is not meant here, at present, either to censure or to commend it; circumstances may sometimes make a thing to be lawful, which, considered by itself, would be unjust; but such times are truly unhappy, when necessity must be pleaded in support of a right.

It remains that I now inquire into the conduct of France. My proofs † on this head will be clear. They are indeed nothing less than the public laws of that kingdom. By some very old French ordinances it is declared, not only that the enemy's goods shall be adjudged to be lawful prize, but that the neutral vessel which carries them, or the property of any ally which shall be joined with them, shall be joined also in the condemnation. It has always been a maxim of the courts of maritime jurisdiction of France, "Que la robe d'ami confisque celle d'enemie;" and so clear were they in this opinion, that the laws which established it, were repeatedly enacted in the reigns of two of their kings, Francis I. and Henry III.

* See a letter of Puffendorf in Jo. Gronngii Bibliotheca Universalis Librorum Juridicorum, p. 105.

† See the ordinances of France, Francis I. 1543, c. 4, 2 Henry III. 1584, c. 69.

That the practice of the French marine hath in this particular been conformable to their laws, may be proved by a thousand instances. I shall select one upon the authority of a minister of Holland, which will shew what their conduct was in that Spanish war which preceded the Pyrenean treaty. In a letter of Monsieur Boreel from Paris, to Monsieur de Witt, December 26. 1653, "On tient ici," says he, "pour maxime favorable a leurs interests, que leurs enemies ne doivent recevoir ni defense ni service des sujects de leur H. H. P. P. en transportant de chez eux quelques merchandises ou commodités ou d'autres, qui seroient pour le compte de l'enemie, sous peine, au cas qu'ils les trouvent dans les batiments Hollandois, qu'ils seront de bonne prise, et qu'on les puisse enlever des dits batiments et les confisquer."

But it is not the old laws of France alone that thus determine this point; their more modern regulations confirm it. One of the last and greatest services which Colbert performed to his country, was the establishment of a system of naval laws, the wisest and best digested which the spirit of legislation hath ever yet produced. It is observable, that although the ordinance which contains these laws was registered in 1681, several years subsequent to those treaties, by which France agreed that neutral vessels should protect the property of an enemy, yet it pays no attention to them, and establishes the contrary doctrine. This proves how little regard France always shewed to that article. The words of the ordinance expressly condemn not only the enemy's goods, but the neu-

tral ship which carries them. "All ships (saith the law*) which have goods on board, that belong to the enemy, shall be good prize." These laws continue still to be observed in France. At the commencement even of the present war, the French government delivered to Mons. Berkenrode, the Dutch minister at Paris, a memorial, "Contenant les precautions" (as the title expresses it) "que doivent prendre les negociants Hollandois conformement à l'ordinance de la marine et aux reglements de la France, pour eviter que leurs navires soient declarés de bonne prise." In the preamble of this, the words of the above mentioned law are repeated, and the same rule of condemnation is declared to be still in force; and the seventh article of the Memorial lays even a greater restriction on neutral commerce, than the ordinance of 1681 seems to have intended. It is there said, "Si les navires Hollandois transportoient des merchandises du cru ou fabrique des enemies de la France, ces merchandises seroient de bonne prise, mais le corps du navire seroit relaché." By this memorial, therefore, every thing which is either of the growth or manufacture of the enemy's country, when found on board the ships of Holland, though the property does not appear to belong to the enemy, is declared to be good prize. The same restriction evidently extends to all other neutral traders.† Is not this almost a total prohibition to neutral powers, of any commerce with the enemies of France?

* Naval ordinance of 1681, tit. 9, art. 7.

† See the preamble of the Memorial.

Let us now look back on what has been said. The deduction which I have made hath, I fear, been tedious; but the importance of the subject by force led me into it. I flatter myself, however, it has appeared that reason, authority, and practice all join to support the cause I defend. By reason, I have endeavoured to trace out those principles on which this right of capture is founded, and to give that weight to my own sentiments, which of themselves they would not deserve; I have added the authorities of the ablest writers on this subject; and lastly, I have entered largely into the conduct of nations, that I might not only lay thereby a broader foundation for this right, but that I might the more fully illustrate, by the extravagant pretensions of other States in this respect, the present moderation of England. No age or country ever gave a greater extent to the commerce of neutral nations, and we have seen that most in the same circumstances have confined it within much narrower bounds.

There remains still, however, one objection to what has been said, and that of so plausible a cast, that I cannot leave it without an answer. It has been pretended that the liberty of navigation is destroyed by means of these captures, and that a violent restraint hath been put on the lawful industry of mankind. The liberty of navigation, in fair construction, can mean no more than the right of carrying to any mart unmolested the product or manufacture of one's own country or labour, and bringing back whatever may be received in return for it; but can it be lawful that

you should extend this right to my detriment; and when it was meant only for your own advantage, that you should exert it in the cause of my enemy? Each man hath a right to perform certain actions; but if the destruction of another should follow from them, would not this be a just reason of restraint? The rights of mankind admit of different degrees, and whenever two of these come into competition, the lowest in the scale must always give place to the higher; but you will say, that you have a profit in doing this; if, however, it is otherwise unjust, will that consideration convert it into a right? If you mean that your own commerce ought to be free, the right is not in the least denied you; but if, under this disguise, you intend to convey freedom to the commerce of the enemy, can policy or justice require it? What can neutral nations desire more, than to remain amid the ravages of war in the same happy circumstances which the tranquillity of peace would have afforded them? But can any right from hence arise, that you should take occasion from the war itself to constitute a new species of traffic, which in peace you never enjoyed, and which the necessity of one party is obliged to grant you, to the detriment, perhaps destruction, of the other? If this right was admitted, it would become the interest of all commercial states to promote dissension among their neighbours; the quarrels of others would be a harvest to themselves; and from the contentions of others they would gather wealth and power. But, after all, the rights of commerce are not the real cause of this dis-

pute, and liberty of navigation is only a fair pretence, which ambition hath thought fit to hold forth, to interest the trading states of the world in its cause, and to draw down their indignation upon England; this is not the first time that a deceit like this hath been practised; when the power of Spain was at its greatest height, and Elizabeth wisely contended against the mighty designs of Philip, the capture of some vessels belonging to the Hanse Towns gave occasion to a contest of this nature; but they were the emissaries of Philip, who at that time blew up the flame, and, pretending a love to commerce, promoted the ambitious projects of their master; the Queen of England published an apology for her conduct, and this was answered in a virulent and abusive manner, not from any of the Hanse Towns, but from Antwerp, a city under the dominion of Spain, and it seemed to be written (says Thuanus) "per hominem Philippi partibus addictum, non tam pro libertate navigationis et in Germanorum causâ defendendâ, quam in Hispanorum gratiam, et ad reginæ nomen proscindendum:" the interests of commerce were the pretended cause of this dispute, but the real cause was the interest of Philip; the pretended design was to preserve the liberty of navigation, but the real end was to serve the cause of ambition, and to destroy the government of England. It is not necessary to enter into a comparison of this case with our own at present, the resemblance is too obvious.

Here, then, we might rest our cause, if the law of nations was the only foundation, on which this point

could be argued; but the bands of equity having been found alone too weak to hold the nations of the world to their duty; their interest taught them to renew and confirm these by contracts among themselves, and frequently to stipulate in addition certain mutual advantages, greater than what the law of nations singly would have allowed them: Let us, consider, therefore, what influence these may have in the present case; whatever they are, I mean to give them all the force which reason or justice can require: if our ancestors have betrayed the interest of their country in granting any privileges of this nature, we, who have succeeded to their rights, are bound to abide by their concessions; it is the happiness of great kingdoms, whose power is equal to the support of their own independency, to be able to act up to those principles which necessity hath often forced little states unhappily to abandon: Those scandalous maxims of policy which have brought disgrace both on the name and the profession, took their rise from the conduct of the little principalities of Italy, when, distressed by their successive invasions, which France and Spain made upon them, they broke or conformed to their leagues as their own security obliged them; and their refined shifts and evasions, formed into systems by the able doctors of their councils, have composed that science which the world hath called politics, a science of fraud and deceit; by which kingdoms are taught to be governed on principles, which individuals would be ashamed to profess; as if there could be no morality among nations, and that mankind, being formed

into civil societies, and collectively considered, were set free from all rules of honour and virtue:—Maxims like these I mean to avoid; to follow them would bring dishonour on my country.

It must then be allowed, that there are articles in some of our maritime treaties with other nations which have stipulated, that "All which shall be found on board the vessels belonging to the subjects of those countries shall be accounted clear and free, although the whole lading or any part thereof shall by just title of property, belong to the enemies of Great Britain;" such an article is inserted in those maritime treaties which Great Britain hath made with France* and Holland:† It has also by some been supposed, that the subjects of the crown of Spain have a right to enjoy a privilege of the same nature; certain, however, it is, that no such article as that above mentioned, can be found in the maritime treaties between that country and Great Britain, and particularly in that of Madrid of 1667, which is the principal maritime treaty at present in force between the two kingdoms; but as a mistake in this respect may possibly have arisen from a false interpretation of two articles in the treaty of Madrid, which declare, in general‡ that "the subjects of the two crowns respectively shall have liberty to traffic throughout all countries, cultivating peace, amity, or neutrality with either of them,

* Treaty between Great Britain and France, 24th February 1677. Art. 8.

† Treaty between Great Britain and Holland, 1st December 1674. Art. 8.

‡ Treaty of Madrid, 1667. Arts. 21 and 22.

and that the said liberty shall in no wise be interrupted by any hinderance or disturbance whatsoever, by reason of any hostility, which may be between either of the said crowns and any other kingdoms;" and as the liberty here stipulated may by some erroneously be imagined to extend so far, as to grant a right to carry freely the effects of the enemy; it will be proper here to remove this error, and to stop a little to shew the true design and meaning of these articles: This explanation is at present the more necessary, as it will tend to illustrate the true sense of other stipulations of precisely the same purport, which may be found in several of our commercial treaties, and particularly in the first and second articles of that with Holland, of December 11. 1674; a wrong interpretation of which hath already given occasion to great confusion and much false reasoning upon the present question.

It cannot, I think, be doubted, that, according to those principles of natural equity, which constitute the law of nations, the people of every country must always have a right to trade in general to the ports of any state, though it may happen to be engaged in war with another, provided it be with their own merchandise, or on their own account; and that, under this pretence, they do not attempt to screen from one party the effects of the other; and, on condition also that they carry not to either of them any implements of war, or whatever else, according to the nature of their respective situations, or the circumstances of the case, may be necessary to them for their defence. As

clear as this point may be, it has sufficiently appeared, by the facts deduced above, that, amid the irregularities of war, the rules of equity, in this respect, were not always enough regarded; and that many governments, in time of war, have often most licentiously disturbed, and sometimes prohibited *totally*, the commerce of neutral nations with their enemies. About the middle, therefore, of the last century, when the commercial regulations which at present subsist between the European powers first began to be formed, it became absolutely necessary to call back the attention of governments to those principles of natural right, from whence they had strayed; and to fix and determine, by the articles of their respective treaties, what was the ancient and acknowledged rule of the law of nations; for this purpose, the negociators of that age, inserted in their commercial regulations, articles* to the same purport as those above mentioned, asserting, in general, a right to trade unmolested with the enemies of each other; and these they usually placed among those articles of general import, which are commonly first laid down in treaties, as the basis on which the subsequent stipulations are founded; the rule, therefore, of equity, in this case, being thus defined, they came afterwards to erect upon it such privileges as that rule alone would not have allow-

* Treaty of commerce between France and Holland, 1662, Arts. 26 and 27. Treaty of commerce between England and Holland, Feb. 17. 1668, Arts. 1 and 2. Treaty of commerce between England and Holland, December 1. 1674, Arts. 1 and 2. Treaty of commerce between England and France, February 24. 1677, Arts. 1 and 2.

ed them; and, among the rest, some nations, as their interest prompted them, granted mutually to each other, in new and distinct articles, by express stipulations, the right of carrying freely the property of their respective enemies. These last articles, therefore, must be considered as wholly distinct in their nature from those before mentioned, and in their meaning totally different; the first are in affirmance of an old rule, the last create a new privilege;—those only confirm a right which was determined by the law of nations before; these make an exception to that law:—if they both imply the same sense, why are both so often found inserted in the same treaties?* Would the repetition in such a case have been necessary? and to what purpose were new articles added to grant a privilege which was already included in the terms of the preceding? The same exception also of contraband goods is again repeated in the last case as well as in the former, and shews clearly that the property, which is the object of the exception in the different articles, must likewise in its nature be different; the one relates to the ordinary means of traffic, which every nation enjoys, of its own produce or property, the other to the property of the enemy.

But this point is still more clearly explained by the assistance of other treaties, where articles of the same force as the 21st and 22d of the treaty of Madrid are inserted, and the intention of them fully made appear from the subsequent parts of the same treaties. In the treaty of commerce between Great Britain and

* See the Treaties mentioned in the last note.

Sweden, of the 21st of October 1661, it is stipulated, by the 11th article, "that it is by no means to be understood that the subjects of one confederate, who is not a party in a war, shall be restrained in their liberty of trade and navigation with the enemies of the other confederate, who is involved in such war;" and then, in the article which immediately follows, the meaning of these words become manifest beyond a doubt; it is there so far from being supposed that the liberty here granted can be so interpreted as to imply a right of conveying the effects of an enemy, that the very attempt to practise it under favour of this liberty, is there called a* "fraud;" and, as a "most heinous crime," it is ordered "to be most severely punished;" and to prevent any collusion in this respect, the vessels of both parties are required to be furnished with passports, "specifying of what nation the proprietors are, to whom the effects on board them belong." And in the treaty of commerce between Great Britain and Denmark, of the 11th of July 1670, a right of free trade with the enemy is stipulated in the 16th article; and afterwards, by the 20th article, the extent of this right is made apparent, and the means are prescribed for preventing the designs of those, who, under favour of this stipulation, should attempt to protect the property of the enemy, so that the illegality of such a practice being supposed, and not necessary to be expressed, the article then declares, "but lets this liberty of navigation and passage

* See the Treaty of commerce between Great Britain and Sweden, October 21, 1661. Art. 12, and passport.

for one ally, might, during a war which the other may be engaged in, by sea or land, with any other state, be of prejudice to such other ally, and the goods belonging to the enemy be fraudulently concealed, under the colourable pretence of their being in amity together; to prevent, therefore, all fraud of that sort, all ships shall be furnished with passports," the form of which is there set down, and is the same as that mentioned above. From these treaties, then, it manifestly appears, that, by a general stipulation in favour of trade with the enemy of another power, negociators never intended to imply a right to carry freely the property of that enemy; but that to establish such a right, it is necessary to have it expressly mentioned. The 21st and 22d articles, therefore, of the treaty of Madrid, in which liberty of traffic to the countries of the enemies of Great Britain is thus in general stipulated, can therefore be explained to grant to the subjects of the crown of Spain no other right but that of carrying on, without any injurious "molestation" or "disturbance," such traffic as would otherwise be legal according to the law of nations; and by this law, in time of war, it never could be legal to protect the property of an enemy:—This privilege, however, Great Britain hath consented to grant in her commercial treaties with France and Holland; the first of these is put an end to by the present war; it remains, therefore, that I now discourse on this privilege, as it is stipulated in the British treaties with Holland; and I propose to shew that here also it is extinct. But to give a fuller view of my subject, and

to shew the origin and intention of this privilege, it will be necessary to enter a little into the history of it, and to relate the manner in which the article that grants it was first admitted into treaties.

When the United Provinces had put an end, by the treaty of Munster, to that long war which they had so nobly maintained in support of their liberties, and had happily crowned their labours by obtaining a full acknowledgment of their sovereignty; delivered from the cares of war, they wisely turned their thoughts towards the arts of peace. After long contentions among themselves, their commercial provinces at length obtained the greatest lead in the state; the interest of trade was of course the principal object of their policy, their armies were reduced, all who favoured war were no longer in credit, and the views of their ministers terminated chiefly in giving permanence to that extensive traffic which had supported them through all their distresses, and to the effects of which they principally attributed all their power and freedom.

They were indeed at this time so fully masters of almost all the commerce of the world, that they had little else to do but to preserve the possession of it; the public was, on this occasion, amused with a new species of policy, the offspring rather of avarice than ambition, desirous of keeping the rest of mankind in indolence, that it might more fully reap the fruits of its own industry, where wealth was at least the first object in view, though in the end it might be accompanied by its usual attendant, power; the arts which

they practised to preserve their fisheries, and to secure to themselves alone the trade of the Asiatic spices, are well known, and not at present to our purpose; they urged loudly the freedom of navigation till they had made it free indeed for themselves; but they have been charged with practising a different doctrine on the other side of the line to what they professed on this; and with seeking to establish an exclusive trade on those very seas, the freedom of which, from Papal grants and Spanish pretensions, the pen of their Grotius had so ably defended.

There was, however, another species of commerce which demanded their attention even more than either of the former, as it was not only a profitable branch of traffic in itself, but as it greatly tended to the security of the rest, by being the principal basis of their naval power: this was the trade of freightage, or the carrying trade, the subject of our present discourse. To understand their views in this respect, we must first take notice of the foundation on which their policy was built. They had succeeded to the Hanseatic traders, in becoming the carriers of the world; long possession had therefore furnished them with great numbers of sailors and ships, and to these they added uncommon parsimony and industry, the natural endowments of their people. These made them contented with small profits, and enabled them to carry the manufactures of each country even cheaper than the natives of it themselves. With such happy circumstances in their favour, they were sure of making this branch of trade wholly and perpetually their

own, if they could, by their negotiations and policy, establish two points.

The first was, that no nation should grant to its own natives any privileges in relation to freightage which the people of Holland should not equally enjoy, nor any exclusive right in favour of its own navigation.

And as the consequences of war would otherwise frequently interrupt the course of this traffic, they laboured to obtain, as their second point, that, whenever any other nation was engaged in war, they might then enjoy, as neuters, the right of protecting the property of its enemies.

These points, once obtained, would open a larger field on which their industry might exert itself, than what they could otherwise of right pretend to enjoy. They were wise, however, in endeavouring to obtain it, no nation besides themselves had more shipping than what was equal to the carriage of their own produce and manufactures; they alone, therefore, could carry on the freightage of other countries, and largely reap, when their neighbours were at war, the advantages proposed.

The regency of Holland laboured with great perseverance for the establishment of these two points; their great minister, De Witt,* filled all his instructions and dispatches with every argument and motive which his active mind could invent in support of these favourite maxims; they were willing to give up any temporary advantage, to gain that which, once ac-

* Lettres de Monsieur De Witt *passim*.

quired, would prove for ages an overflowing spring of wealth. By their negotiations they earnestly laboured to induce France to comply with their desires in these respects; but here they were a long while unsuccessful. In opposition to the first point of their policy, Fouquet, while he was at the head of the French marine and finances, established the tax of 50 sous per ton on all foreign shipping, and endeavoured thereby to encourage and augment the freightage of his own country; and when, upon his disgrace, Colbert succeeded to his employments, this tax of 50 sous was almost the only part of the former's policy which the latter thought fit to adopt. It is amazing with what zeal and application the ministers of Holland contended for the abolition of it. France at length relaxed her severity on this head, not so much to favour the trade of the Dutch, as in compliance with the interests of her own. Colbert's great schemes to improve the manufactures of his country had met with better success than his plans for the augmentation of its marine; and the frequent wars in which his ambitious master involved his kingdoms, gave repeated checks to the freightage of his people. To give a larger vent to her manufactures, France found it necessary at last, therefore, to open her ports to foreign vessels, and for this purpose she took off the tax of 50 sous, by the treaty of Ryswick, as far as it related to the ships of Holland alone; and since that time, she has regulated her conduct in this particular, as the interest of her trade requires. In time of war, she always remits this tax, for she is then forced to make

use of the freightage of neutral nations, as her naval power is not equal to the protection of her own; and in time of peace, she preserves the tax or not, as the increase or diminution of her shipping requires, always giving the greatest encouragement to her own marine, which is consistent with the preservation of her manufactures.

France consented sooner to the other point of Dutch policy, and granted by treaty, to the vessels of Holland, as neuters, the right of protecting the effects of an enemy; the laws or edicts of the French government have, however, continued always to determine against this right, and in this respect, therefore, their laws and treaties have contradicted each other; some very ancient ordinances of that kingdom (as we have shewn above) had adjudged as lawful prize in this case, not only the enemy's goods, but had joined also in the condemnation the neutral vessel which carried them; the last, however, of these points was remitted as early as 1646, by a temporary treaty then made with Holland, the neutral vessel, and all the effects of a friend found on board it, by this treaty were ordered to be spared. In a subsequent negotiation, Holland endeavoured to get this privilege farther confirmed and extended; it was one great part of Monsieur Boreel's employment in his long embassy at Paris. At last, however, in the memorable treaty of defensive alliance between Holland and France, of the 27th of April 1662, this favour was obtained in its full extent. By the 35th article* it is reciprocally

* See the Treaty in the letters of D'Estrade, tom. i.

agreed, that all which shall be found on board the vessels of either of the contracting parties, " encore que la charge ou partie d'icelle fut aux enemies, sera libre et affranchie." This article was again renewed by the marine treaty of 1678, and by several subsequent treaties. The marine treaty of the 21st December 1739, was the last in which it was inserted. This continued in force during part of the last war; but in the year 1745, the French government declared this treaty void by an act of council, and it hath never since been renewed. France, from the state and condition of her mercantile marine, could certainly reap no advantage from the insertion of this article in her own treaties; but it was wise in her to endeavour to establish this point, as a general maxim of national law, among other countries: experience hath proved to her the advantage and protection which her commerce derives from it in time of war.

But Holland most exerted her policy to bring that nation to a compliance with her maxims whom she most apprehended as her rival in trade. The scandalous ignorance of the English ministers in point of commerce, and the little attention which they paid to the interests of it during the reigns of the two first princes of the house of Stuart, gave such advantages for some time to the Dutch, that more vessels of that country were seen in the ports of our colonies than even of our own. The shipping of England from the reign of Elizabeth had been in a constant decline. We should hardly have believed that, in the reign of Charles I., England could not have furnished more

than three merchant vessels of 300 tons, if Sir Josiah Child had not affirmed it. The time at length arrived, when the government of England determined that the country should be put on an equal footing, in this respect, with our neighbours, and took the manly resolution of assuming and vindicating all the advantages resulting from our own commerce and industry to ourselves. In 1651 the Parliament of England passed into an ordinance that noble strain of commercial policy called since the Act of Navigation. Mr St John returning about this time from his embassy at the Hague, became the happy instrument which Providence made use of to accomplish this great work;* resenting highly the refusal which had there been given to his proposals, and the insults which had been offered to his person, he warmly solicited, and at length induced the Council, of State to move the Parliament to pass it; the committee sat five days in forming it; and it was at last published by order of the House with great pomp and ceremony at the Royal Exchange. The Dutch were so sensible of its consequences, that it was the principal cause of the ensuing war; they called it, in a manifesto† published soon after, "A vile act and order." At the negotiations for that peace which put an end to the war, De Witt laboured with his usual industry and acuteness to procure the abolition of it; his efforts were happily in vain; they who made the law attended with vigour to the execution of it; the effects of it were im-

* Ludlow's Memoirs, vol. i. p. 345.

† The Manifesto of Holland, 1652.

mediately apparent: this act of policy alone hath fortunately outweighed all our other follies and extravagancies; though condemned by some of our historians, and unnoticed by others, it hath proved the fertile source of all our naval power; it hath operated insensibly to our preservation, and hath been the spring from whence hath flowed the wealth and greatness of England.

Our ancestors, with equal constancy, for some time withstood the other maxim of Dutch policy, and would not permit the vessels of that Republic, in quality of neuters, to protect the property of the enemy. By a very ancient and remarkable treaty, made when the dukes of Burgundy were sovereigns of the Low Countries, the contrary opinion had long been established; in that, it was determined,* "Quod subditi unius principum prædictorum" (that is, Henry VII. King of England, and Philip Duke of Burgundy) "non adducent aut adduci facient per mare, fraudulosè, vel quocunque colore, aliqua bona seu merchandizas inimicorum alterius eorundem principum." And it farther stipulated, that in case the master of the neutral vessel shall endeavour, by a false report, to defraud the captor of any of his enemies' effects, he shall be obliged to make good the loss sustained thereby by the forfeiture of as much of his own. Frequent applications were made previous to the Restoration of Charles II. both to the Parliament and to the Protector, to alter the course of proceeding in this respect; but those eminent men who plan-

* Intercursus Magnus, in Rymer's Fœdera, vol. xii. p. 585.

ned the act of navigation, understood too well the interests of commerce, and were too much attached to the maritime greatness of this country, ever to consent to this, or even listen to such a proposal. After the Restoration a particular occasion at length induced England to make the concession; by the treaty of commerce made at the Hague 17th of February 1668, this point was fully settled to the satisfaction of Holland; by the 10th article of which it was mutually stipulated, that the shipping of each country should carry freely the goods of the enemies of the other. The circumstances of the time, and the situation of affairs, when this concession was made, account for the admission of it into this treaty, and in some degree apologise for the authors of it. Lewis XIV. had then just commenced the first career of his ambition, and England resolved with spirit to throw herself in his way. Holland was then engaged in a strong defensive alliance with France, from whom it was necessary to separate her, and to make her join with England, to support the independency of Europe. The Dutch ministers, always mindful of their favourite object, seized this fortunate opportunity of obtaining from England the same advantages in favour of their shipping which they had already acquired by their treaties with France. It hath been the policy of most republics never to enter into any alliance where some benefit doth not accrue to themselves, and Holland could not be expected to deviate from this maxim on the present occasion, in compliment to the King of England, who had always shewn

but little affection to the States; the war also with England was but lately ended, and the wound but weakly healed. The French treaty of 1662, besides its defensive stipulations, contained also several commercial regulations, all of which were the favourite object of Holland; these had been provisionally referred to a few months before, in the negotiations then pending at Breda, with a design to prevent any intermediate disputes between England and Holland, until a treaty of commerce, which was then under deliberation, was concluded; but unless these regulations were perpetuated on the present occasion, and formed into a permanent national treaty, to which, however, England was averse,* the states were resolved not to join in the alliance proposed. Mons. de Witt expressly told Sir William Temple,† "that the treaty of defensive alliance must, for a basis, have at the same time an adjustment of matters of commerce," and unless this could be obtained, it was the avowed opinion of that great pensionary not to conclude. Influenced by the sentiments of their minister, the states persisted in the same resolution: they forced at last Sir William Temple to yield the point. Apprehensive of the least delay, and of the uncertainties which would necessarily follow from it, he ventured to comply with their desires, though he exceeded thereby his instructions; a private promise passed first between him and Mons. de Witt, and in consequence of that, a few weeks after, a treaty of commerce was

* Sir William Temple to Lord Arlington, Feb. 12. 1668.

† The same to the same, Jan. 24. 1668.

concluded. We have before observed, that in the 35th article of the treaty of 1662, the French consented to grant the right of protecting enemies' property to neutral vessels; this privilege, therefore, came of course to be conceded in our commercial treaty of 1668; and the advantages which would arise from thence in favour of the trade of Holland, were the concession which England then chose to make, that she might obtain the assistance of that Republic against France; to what other purpose could England at this time establish a rule of maritime law which she had before so often refused, and now so reluctantly granted to the earnest solicitations of the states? any benefit which the British trade might reap from the mutual stipulation of this article, could never be the object which the ministers of this country had in view. The article, considered by itself, is of the most fatal consequence to the power and trade of Great Britain; when she is at peace, and her neighbours are at war, she cannot reap any benefit from it, as her own shipping is not, in general, more than equal to the maritime commerce of her people; and when, on the other hand, Great Britain is at war, and her neighbours at peace, it tends to render fruitless, in a great degree, the efforts of her naval force, while, at the same time, considered as a general maxim of right among other nations, Great Britain neither wants the use of it, as she is equal, in time of war, to the protection of her own shipping; neither can her merchants enjoy the advantage of it, as the employment of foreign freightage is in most respects directly con-

trary to her laws. This article was again renewed and admitted into the treaty of commerce of 1674, in consequence of its having been before stipulated in that of 1668. The treaty of 1674 is the maritime regulation which at present subsists between Great Britain and Holland.

In this manner therefore the article having obtained existence in these treaties, we are now to consider, whether it is still in force.

Treaties of alliance being nothing more than stipulations of mutual advantages between two communities in favour of each other, ought to be considered in the nature of a bargain; the conditions of which are always supposed to be equal, at least in the opinion of those who are parties to it: he, therefore, who breaks his part of the contract, destroys the equality or justice of it, and forfeits all pretence to those benefits which the other party had stipulated in his favour: "Si pars una (says Grotius *) "fœdus violaverit, poterit altera a fœdere discedere, nam capita fœderis singula conditionis vim habent." And Puffendorf, speaking of conventions, says,† "Nec hæc alterum obligant, ubi ab uno legibus conventionis non fuerit satisfactum."

The next question then is—Hath Holland complied with her part of the treaties or contracts to which she is mutually bound with England?—Hath she performed all, that she hath stipulated in our fa-

* Grotius de Jure Belli et Pacis, l. 2. c. 15. sec. 15.

† Puffendorf de Jure Natur. et Gentium, l. 3. c. 8. sect. 8.

vour?—or hath she been deficient in the execution of some article, in which the very life of our alliance is contained?—If a part so essential should be extinguished, it would be unnatural to suppose, that any lesser limb of the treaties should continue to have vigour; Holland in this case could have no pretence to require the execution of what may have been conceded in her favour; especially, if the performance of it would operate to the detriment of that ally, whose friendship she hath forsaken.

I doubt not, but my reader hath already answered in his own mind the question proposed;—that the possessions of the crown of Great Britain in Europe have been attacked by the armies of France; that in consequence of this, on the 2d of August 1756, the British Government made to the States General in proper form, the necessary requisition;—that in such case Holland is obliged by treaties to grant immediate succours, and after a certain time to join with Great Britain in open war;—that she hath not performed these conditions, and hath therefore forfeited all title to any advantages, contained in those treaties, and above all to such as may arise from the nature of the war itself?

I shall state, however, this point something more particularly;—Holland is engaged in three different guarantees or defensive treaties with Great Britain: the first is that ancient original defensive alliance, which hath been the basis of all the subsequent treaties between the two nations; this treaty was designed to have been made immediately after the triple

alliance, but the unsteady conduct of the ministers of Charles II., and unfortunate attachment of that monarch to the French court, for some years delayed it; it was at last however concluded at Westminster the 3d of March 1678: it is (except in two immaterial alterations) an exact copy of the twelve first articles of the French treaty of 1662; and both were negotiated by the same minister, Monsieur Van Beuningen. In the preamble of this treaty,* "the preservation of each other's dominions is set forth as the cause of making it; and the stipulations of it are,† "a mutual guaranty of all they already enjoyed, or might hereafter acquire, by treaties of peace, in Europe only:" They farther guaranty, "all treaties, which were at that time made, or might hereafter conjointly be made, with any other power:" they promise also to ‡ "defend and preserve each other in the possession of all towns or fortresses, which did at that time belong, or shall for the future belong, to either of them;" and for this purpose it is determined,§ that "when either nation is attacked or molested, the other shall immediately succour it with a certain number of troops and men of war, and shall be obliged to break with the aggressor in two months, immediately after the party, that is already at war, shall require it; and that they shall then act conjointly with all their forces, to bring the common enemy to a reasonable accommodation."

* See the Treaty Preamble. † Art. 2.
‡ Arts. 3, and 4. § Art. 5. and 1st separate Article.

That Holland hath not complied with the terms of this guaranty is evident;—Minorca, "a possession of the crown of Great Britain," and which she "acquired by treaty," hath been attacked, this is one case of the guaranty;—by that attack, "a treaty that was made in common concert," the treaty of Utrecht, hath been broken; this is a second case of the guaranty;—and by these means, "England hath been deprived of a possession, which of right belonged to her;" this is a third case of the guaranty;—and notwithstanding all this, Holland hath not as yet granted the succours stipulated; and many more than two months have passed without her having entered into war conjointly with England, as the treaty requires.

The second species of defensive alliance, which subsists between Great Britain and Holland, is that which was first agreed to, in the treaty of barrier and succession of October 29. 1709, and again more particularly stipulated in another treaty to the same purpose of January 29. 1713: the design of this treaty is the guaranty of the Dutch barrier on one part, and the guaranty of the firmest barrier of British liberty, the protestant succession, on the other; the stipulations are,* "that in case either should be attacked, the other should furnish, at the requisition of the party injured, but at his own expense, certain succours there expressed; and if the danger should be such as to require a greater force, that he shall be obliged to augment his succours, and ultimately to

* Art. 14. of the Treaty of Barrier and Succession of January 29. 1713.

act with all his power in open war against the aggressor." I pretend not to make any use of this treaty in the present case; and only mention it to give a fuller view of the alliances which subsist between us;—here, however, I will indulge a wish, that the case of this guaranty, as far as it relates to the right of the crown of Great Britain, may never again exist: I always read with sorrow, that there ever was a time, when the unfortunate dissensions of our people, in a point, where the whole of their happiness was concerned, should have made it necessary to add any other sanction to our laws, or any other security to our constitutional rights, than such as our own power can afford them; these days however of shame now, I hope, are passed; more than forty years' experience of the mildest government must have won the most obdurate heart to confess the present felicity, and bless the hand which bestows it: when forgetting ancient errors, we are thus united in defence, the affections of his Majesty's subjects are the happiest guaranty of his right.

I come now to the last species of defensive alliance, which subsists between Great Britain and Holland; this was concluded at the Hague the 4th of January 1717; to this treaty France was a party: the intention or view of it was,* "the preservation of each other reciprocally in the possession of their dominions, as established by the treaty of Utrecht;" and the stipulations are, "to defend all and each of the

* Art. 5.

articles of the said treaty, as far as they relate to the contracting parties respectively, or each of them in particular; and they guaranty all the kingdoms, provinces, states, rights, and advantages, which each of the parties at the signing of that treaty possessed;" and in a separate article all this is confined * to "Europe only;" the succours stipulated in support of this guaranty, are much the same as those mentioned above, first,† "Interposition of good offices," —then a certain number of forces,"—and lastly, "declaration of war." This treaty was renewed by the quadruple alliance of 1718, and again by the accession of Holland to the treaty of Hanover of 1726, and last of all by the 3d article of the treaty of Aix-la-Chapelle.

Holland hath by no means executed the terms of this guaranty,—Minorca, "a possession of the crown of England in Europe, which she enjoyed at the signing of this treaty," hath been attacked; this is one case of the guaranty;—by this attack, "the article of the treaty of Utrecht, by which that possession was ceded to England," hath been broken; this is another case of guaranty: I need not again observe, that Holland, in consequence of this, hath neither granted the succours, nor declared war, as this treaty also requires.

It will here, however, be objected, "that Great Britain was the aggressor in the present war, and unless she had been first attacked, the case of the guaranties doth not exist." True it is that the treaties, which contain these guaranties, are called defensive

* Separate Article. † Arts. 5. and 6.

treaties only, but the words of them, and particularly that of 1678, which is the basis of all the rest, by no means express the point clearly in the sense of the objection; they guaranty in general, "all the rights and possessions" of both parties against "all kings, princes, republics, and states:"—so that if either "shall be attacked" or "molested," whether it be "by hostile act or open war," or "in any other manner whatsoever, disturbed in the possession of his estates, territories, rights, immunities, and freedom of commerce," it then declares what shall be done in defence of these objects of the guaranty, by the ally who is not at war; but it is no where mentioned as necessary, that the attack of these should be the first injury or attack; nor doth this loose manner of expression appear to have been an omission or inaccuracy: they, who framed these guaranties, certainly chose to leave this question without any farther explanation, to that good faith, which must ultimately decide upon the execution of all contracts made between sovereign states: it is not presumed, they hereby meant, that either party should be obliged to support every act of violence or injustice, which his ally might be prompted to commit, through views of interest or ambition: but, on the other hand, they were cautious of affording too frequent opportunities to pretend that the case of the guaranties did not exist, and of eluding thereby the principal intention of the alliance; both these inconveniences were equally to be avoided; and they wisely thought fit to guard against the latter of these no less than the former: they knew that

in every war between civilized nations, each party always endeavours to throw upon the other the odium and guilt of the first act of provocation and aggression, and that the worst of causes was never without its excuse: they foresaw, that this alone would unavoidably give occasion to endless cavils and disputes, whenever the infidelity of an ally inclined him to avail himself of them: to have confined, therefore, the case of the guaranty, by a more minute description of it, and under closer restrictions of form, would have subjected to still greater uncertainty a point, which, from the nature of the thing itself, was already too liable to doubt; they were sensible, that the cases would be infinitely various, that the motives to self-defence, though evidently just, might not always be universally apparent; that an artful enemy might disguise the most alarming preparations, and that an injured nation might be necessitated to commit even a preventive hostility, before the danger, which caused it, could be publicly known; upon such considerations these negotiators wisely thought proper to give the greatest latitude to this question, and to leave it open to a fair and liberal construction; such as might be expected from friends, whose interests these treaties were supposed to have for ever united, and such on the present occasion Great Britain hath a right to demand.

If, however, we should, for the present, wave this interpretation, and allow the treaties to have all the meaning, which they, who make this objection, require, the evidence of facts will sufficiently prove,

that France was the aggressor in the present war;—if we look to America, the present war there is little more than a continuation of the last; repeated usurpations of the possessions of Great Britain have been there the constant employment of France, almost from the hour in which the treaty of Aix was signed; and these were at last followed by an avowed military attack upon a fort belonging to the crown of Great Britain, by regular troops acting under a commission from the Court of France. If we consider America as having no concern in the present question, the same ambitious power will also be found to have been the aggressor in the European war; France early manifested her hostile intentions in Europe; in 1753, in direct opposition to the express stipulations of three solemn treaties,* she began to restore the port of Dunkirk; and Holland then considered this action in such a light as induced her, in conjunction with the British government, to present a memorial against it: France also gave another proof of her hostile intentions, by her design to invade Great Britain, avowed by her ministers in every court of Europe, and sufficiently manifested by the preparations which she publicly made for it. And these were likewise followed by an open attack upon an European island belonging to Great Britain, an attack upon the island of Minorca. It seems indeed allowed, by the opinion of the parties concerned, that by the attack of Mi-

* IXth Art. of the Treaty of Utrecht; IVth Art. of the Treaty of the Hague 1717; and XVIIth Art. of the Treaty of Aix-la-Chapelle.

norca the European war was first completely avowed and commenced; notwithstanding all which passed elsewhere, proposals for an accommodation of the American disputes were never discontinued, nor the war considered as universal, till that island was absolutely invaded. As for the captures at sea, the avowed cause upon which these were taken, sufficiently evince that they undoubtedly belong to the American war; they were made in consequence of the hostilities first commenced in America, and were seized as reprisals for the injuries there committed on the property of the people of England; as such they were always declared to be taken by the ministers of that kingdom, and the value of them to be on that account retained;* and upon application made to parliament soon after the seizure of them, the legislature expressly refused to distribute them among the captors, as they have done in respect of all other prizes which have been made since the war of Europe began; but even if this distinction, which puts the question out of all doubt, had not been made by the ministers of England, these captures surely can never be looked upon but as a part of the American war. It will not certainly be denied that such a war may extend itself to the ocean, without having changed either its nature or denomination. What but captures at sea have been the great constituent part of every American war before the present? As a war upon the American continent must always be supported by succours sent from Eu-

* See the British declaration of war.

rope, it is absurd to suppose that either party in this case would not endeavour, as far as he was able, to take and destroy entirely the shipping of his enemy, by which alone those succours could be conveyed. Countries which have very little internal force within themselves, cannot be defended but by such troops as are thrown into them; to defeat, therefore, the only means by which this relief can be effected, must be esteemed as material a part of such a war, as the means to invest a fortress are a material part of a siege. But after all, these captures were subsequent to the restoration of the port of Dunkirk, or the * preparations to invade Great Britain; and these can never be considered but as undoubted acts of aggression. It is not the first military action alone, but hostile preparations, where the design is apparent,† the usurpation of another's rights, or the denial of justice, which, in the opinion of the ablest writers, denominate the aggressor; the objects of the defensive treaties are "rights, immunities, and liberties," no less than "towns or territories," and the "disturbance" or "molestation" of the former, as well as the "attack" of the latter, are expressly declared to be cases within the guaranties.

* Undoubted intelligence was received of this before the 27th of August 1755, when general orders were given to bring in French vessels; the Lys and the Alcide were taken on the coast of America, and are therefore in every light a part of that war.

† Quanquam et aliquando favor defensionis ab illius partibus stat, qui prior arma alteri infert, ut si quis hostem invasionis jam certum, per celeritatem oppresserit, dum ille adhuc in adparando bello est occupatus.—Puffendorf, de Jure Naturæ et Gentium, lib. viii. cap. 6, sect. 3.

A more subtle objection will still perhaps be made to what has been said. It will be urged, "that though France was the aggressor in Europe, yet that it was only in consequence of the hostilities commenced before in America, with which it is determined by treaties that Holland is to have no concern, and that the rights contested at present are not contained in the guaranties." If the reasoning on which this objection is founded was admitted, it would alone be sufficient to destroy the effects of every guaranty, and to extinguish that confidence which nations mutually place in each other, on the faith of defensive alliances. It points out to the enemy a certain method of avoiding the inconvenience of such an alliance; it shews him where he ought to begin his attack; let only the first effort be made upon some place not included in the guaranty, and after that he may pursue his views against the very object of it, without any apprehensions of the consequence; let France first attack some little spot belonging to Holland in America, and her barrier would be no longer guaranteed. To argue in this manner, would be to trifle with the most solemn engagements. The proper object of guaranties is the preservation of some particular country in the possession of some particular power. The treaties above mentioned promise the defence of the dominions of each party in Europe, simply and absolutely, whenever they are "attacked" or "molested." If in the present war the first attack was made out of Europe, it is manifest that long ago an attack hath

also been made in Europe, and that is beyond a doubt the case of these guaranties.

Let us try, however, if we cannot discover what hath once been the opinion of Holland on a point of this nature. It hath already been observed, that the defensive alliance between England and Holland, of 1678, is but a copy of the twelve first articles of the French treaty of 1662. Soon after Holland had concluded this last alliance with France, she became engaged in a war with England. The attack then first began, as in the present case, out of Europe, on the coast of Guinea; and the cause of the war was also the same, a disputed right to certain possessions out of the bounds of Europe, some in Africa, and others in the East Indies. Hostilities having continued for some time in those parts, they afterwards commenced also in Europe. Immediately upon this, Holland declared that the case of that guaranty did exist, and demanded the succours which were stipulated. I need not produce the memorials of their ministers to prove this; history sufficiently informs us that France acknowledged the claim, granted the succours, and entered even into open war in the defence of her ally. Here, then, we have the sentiments of Holland on the same article, in a case minutely parallel. The conduct of France, also, on this occasion, may be urged in support of the same opinion, though the measure she was forced to take, in compliance with this decree, checked at that time her youthful monarch in the first essay of his ambition, delayed for several

months his entrance into the Spanish provinces, and brought on him the enmity of England.

If any doubt can yet remain about the meaning and intent of this article, it may farther be proved from the opinion of the minister who made it. Immediately after Holland was engaged in the war above mentioned, she sent to the court of France Monsieur Van Beuningen, to press the execution of that guaranty which he had himself concluded. It is remarkable, that in his conversations on this subject with Monsieur de Lionne, the same objection was debated against which I now contend; Van Beuningen treated it with great contempt; he asked Monsieur de Lionne *, if the pretence of the European war being only a continuation of that of Africa, was any thing more than what the English alleged to deprive them of the succours of France; or whether the French ministry laid any stress upon it, as an argument at all to be supported. De Lionne at first gave him to understand, that he thought it of some weight, "A quoi, je repondis," says Van Beuningen, "que je ne croyois pas, que cette objection fut serieuse, puis qu' il dit alors, que celui, qui a commencé la guerre en Guinneé, et de la en Europe, n'a pas commencé de guerre en Europe; et ne pouvoit passer pour troubler la paix et le commerce en Europe, parcequ' il l'avoit troublé ailleurs auparavant;" and then he adds, "Ce, que j'ajoutai a ce raisonnement pour refuter cette objection, resta sans replique." This was the same

* Lettre de Monsieur Van Beuningen à Monsieur De Witt, December 26, 1664.

Monsieur Van Beuningen who negotiated our defensive treaty of 1678; he made the terms of both these guaranties precisely alike; and we have before shewn, that our own case at present is exactly the same as this, on which his opinion hath been produced.

If, however, the words of these treaties had been against the interpretation which hath been given them, I might justly have appealed to the spirit of them, as alone a sufficient foundation on which to rest my opinion: the whole design of all these our alliances with Holland, is to form a barrier against the power of France, whose ambition might otherwise induce her to destroy the independency of Europe: they are, in fact, a regular continuation of that policy which gave birth to the triple alliance, when the dangerous spirit of the French councils first began to appear. To answer this great end, they guarantee the possessions of those two maritime countries, who, from their wealth, their internal strength, and their incapacity of having any ambitious views themselves, are the best security against the designs of others; but as the obligations of these guaranties are too considerable to be made use of on trifling occasions, for this purpose the contracting parties have made one exception:—the rights of the European kingdoms in the distant parts of the world, and particularly in America, are very uncertain, and the cause of frequent dissensions; and it is well known that wars have there subsisted for many years between the trading subjects and commercial companies of the several nations, while the mother countries have lived,

if not in friendship, at least in peace. This, then, is the case particularly excepted from the guaranty; but this exception must always be so interpreted, as to be made consistent with the principal intention of the alliance. If some great country out of Europe should become of so much importance, that for the interest of Europe, it ought to remain in the hands of the present possessors; if the same great disturber of mankind, after many fruitless attempts in his own neighbourhood, should now turn his thoughts another way, and should endeavour, by distant diversions, to enfeeble that power on whose consideration the safety of the public very much depends, and to deprive her of the sources of her wealth, which she hath always so largely expended in support of the common cause; would a generous friend, who attends to the spirit of his engagements, say that the case of the guaranty did not then exist? and, when the reason of the exception is vanished, would he urge the pretence of it as an excuse for giving up the principal point on which the alliance was constructed? But if to this distant attempt, the enemy should add an open and avowed war in Europe—should threaten the mother country with invasion, attack her fortresses, and take occasion from thence to spread his armies over the continent; shall this pretended exception still be urged, when the literal case of the guaranty is now become apparent? on this weak foundation, shall a wise people, under such obligations, not only refuse to grant their assistance, but not permit their forsaken ally to make a full use of his power; holding

back in this manner his arm, when they will not stretch forth their own; and claiming from the very contracts they have broken, that privilege which they turn to the destruction of their ally. The absurdity is shocking. Such, however, is the present case of England. Unhappy in her friendships! she hath neither that assistance from allies which they are bound by treaty to give her, neither is she allowed to exert even her own force, though abandoned to her own defence.

In this manner the point might be determined on a general view of these treaties, and this alone would be sufficient; but it may further be proved, that the article on which Holland founds her right of protecting the property of the enemy, as far as it relates to the present case, hath been particularly repealed long ago. The treaty in which this article was last inserted, was concluded the 1st of December 1674. Four years after this, in 1678, was passed that defensive alliance, * in which it was stipulated between Holland and England, "that if either party should be attacked in Europe, the other should declare war against the aggressor, two months after he is required." By this treaty, therefore, two months after England is attacked by France in Europe, and the proper requisition hath been made, Holland must become the enemy of the latter, as well as England; and to be the enemy of another, means certainly to distress his trade and seize his property; not to preserve the former and protect the latter. If this, there-

* Defensive Alliance of 1678.

fore, is the right interpretation of the word enemy, this article directly and positively declares, that two months after France has attacked the European possessions of England, the ships of Holland shall not have a right to protect the effects of the French. This, therefore, is derogatory to the eighth article of the marine treaty of 1674, and as being posterior to it, absolutely repeals it. In all laws (and such are treaties in respect to nations) the last enacted always sets aside the former, so far as they disagree. Cicero says,* it ought to be considered "utra lex posterius sit lata, nam postrema quæque gravissima."

But this maxim is not necessary on the present occasion, since the same article is again repealed by two subsequent treaties, in words as positive as can be used; for in that treaty,† by which all the old alliances between the maritime powers were renewed immediately after the revolution, and also in that of February 6, 1716, by which they were again renewed upon the accession of the present family to the throne, the treaties of 1674 and 1678 are expressly mentioned, and made a part of both; and it is there declared, that "they shall have the same force and effect, as if they had been inserted in these treaties *verbatim*, that is to say, so far as they do not differ, or are contrary to one another; yet so as whatever hath been established by any later treaty, shall be understood, and performed in the sense therein express-

* Cicero de Inventione.

† Treaty of Friendship and Alliance between England and Holland, August 1689.

ed, without any regard had to any former treaty." Can it then be doubted, that the articles above mentioned are "contrary to one another," as much as peace and war, as much as friendship and enmity? Is not the defensive alliance of 1678 "a later treaty" than the marine regulation of 1674? and ought not, therefore, according to the words of the renewal, "the article of the latter to be performed in the sense therein expressed, without any regard being had to the former?" Since then, the year 1689, this article, as far as it relates to the present case, hath been twice repealed. Thus much, therefore, may suffice to shew that the right of Holland in this respect is extinct.

There remains one more claim to be considered—a claim which, if report had not averred that such a one had been formally offered, would by no means deserve an answer. The northern crowns, whose commercial treaties with Great Britain contain not any article which gives them expressly a right to carry the property of the enemy, have endeavoured to deduce this right from a general stipulation, which is to be found in some of their treaties, declaring, that "they shall be treated in like manner as the most favoured nation." If Great Britain, therefore, hath granted by treaty to any other nation, the right, in time of war, of becoming the carrier of her enemies, they think they are justly entitled to be admitted to the same favour. Under this pretence, they claim this privilege as stipulated in the Dutch treaty of 1674; but it has been proved above, that the treaty of 1674, as far as it relates to the present case, is no

longer in force. If the inference, therefore, was otherwise unjust, the foundation being thus destroyed, whatever is built upon it must necessarily fall with it. But this stipulation of equal favour, from the very nature of it, can relate to nothing else but such advantages as may be granted to foreign traders by the municipal laws or ordinances of each country, such as equality of customs, exemption from the rigour of ancient laws, which would affect them as aliens and the privileges of judges-conservators and consuls; these are the proper objects of favour; and because the whole detail of these could not easily be specified in a treaty, for this reason they are thus comprehended in a general article. If any rights or privileges which could be considered as exceptions to the general rules of the law of nations, were the objects of this stipulation, to what purpose were any other articles added, since this would comprehend them all; and would alone include every privilege which past or future treaties could afford them? and can it be supposed that any nation meant in this manner to preclude itself from the power of exchanging, by treaty with some particular country, any great right of its own in return for an equal advantage? or that this right should, in such case, be universally forfeited to the people of every other nation, who would thus reap the benefit without having been parties to the bargain?

But this point is made clear beyond a doubt, from the words of the treaties themselves, where this general equality is stipulated. In the treaty of commerce,

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between Great Britain and Sweden, of the 21st of October 1661, the principal one at present in force between the two countries; the fourth article, which contains this stipulation, plainly makes it refer to such favours only as may be enjoyed in matters of traffic within their respective dominions; the treatment which the contracting parties shall there give to the subjects of each other, is the principal purport of the article; it specifies many particulars, and, among the rest, it stipulates that the people of both countries shall have "liberty to import and export their goods at discretion, the due customs being always paid, and the laws and ordinances of both kingdoms universally observed;" and then manifestly connecting this with what follows, it adds, "which things being pre-supposed, they shall hold such ample privileges, exemptions, liberties, and immunities, as any foreigner whatsoever doth or shall enjoy;" the general equality, therefore, here stipulated, plainly relates to those places alone where the customs of these kingdoms are to be duly paid, and the laws and ordinances of them are in force, and that is only within their respective dominions: the privileges here conceded cannot possibly have any larger extent; and to confine the sense of the article still more strongly to the explanation which hath now been given of it, the words "in the dominions and kingdoms of each other" are twice repeated, to determine clearly where that trade must be carried on, to which this favour is meant only to be granted; if, however, any doubt could yet remain in respect to this interpreta-

tion, they who made this treaty have given the strongest proof, that under this article they never intended to imply a right of carrying the property of an enemy, since, by the twelfth article of this same treaty, an attempt of that nature is prohibited, and pronounced to be "a heinous crime," and the strongest provisions are made to prevent it. In the treaty of commerce between Great Britain and Russia, of the 2d of December 1734, this stipulation of equal favour is inserted in several articles; but it appears in every one of them to relate to nothing else but to the particular privileges which the subjects of each were to enjoy, while they were trading within the dominions of the other. In the second article, this equality is expressly said to be granted "throughout the dominions of the contracting parties in Europe. In the third it relates only to "the favourable reception of the subjects of each other in the ports of their respective countries." In the fourteenth it grants only an equal freedom to import "such merchandise into each other's dominions as is allowed to the subjects of any other country;" and in the twenty-eighth it refers only to the "respect and treatment which is to be given to the subjects of one party who come into the dominions of the other." In the treaty of commerce between Great Britain and Denmark, of the 11th of July 1670, the latest at present in force between the two countries, the stipulation of equal favour is inserted in the fortieth article; it is there said, "If the Hollanders or any other nation hath or shall obtain from his majesty of Great Britain any

better articles, agreements, exemptions, or privileges, than what are contained in this treaty, the same and like privileges shall be granted to the King of Denmark and his subjects also, in the most full and effectual manner:" that these privileges relate only to customs and other advantages of the same kind, might be proved from the whole tenor of this treaty; but it will be sufficient to shew that the right of carrying the property of the enemy cannot possibly be intended by it. Holland had obtained this right in 1668, two years before the Danish treaty was concluded; if, therefore, the stipulation of equal favour contained in the fortieth article, could extend to an advantage of that nature, the merchants of Denmark would have been immediately entitled to it, from the hour the treaty was signed; the ministers of that kingdom could not be ignorant of this, and yet in the twentieth article they have positively forbid the exertion of any such right. They have even expressed the greatest apprehension lest any liberty conceded by this treaty should be interpreted to that purpose, "lest such freedom of navigation," says the article, "or passage of one ally, and his subjects and people during the war, which the other may have by sea or land with any other country, may be to the prejudice of the other ally, and that goods and merchandises belonging to the enemy may be fraudulently concealed under the colour of being in amity; for preventing fraud and taking away all suspicion, it is thought fit, the ships, goods, and men belonging to the other ally, in their passage and voyage, be furnished with letters of pass-

port; and in the passport the King of Denmark hath bound himself to declare that the ship and the goods with which it is laden, "belong to his subjects, or to others having an interest therein, who are the subjects of neutral powers," and that "they do not appertain to either of the parties now engaged in war." —Nothing more, I hope, need be said, to refute this weakest pretence to a right of carrying freely the property of the enemies of Great Britain.

As there is no article, therefore, which grants a right of this nature, at present in force in any of these commercial treaties, it is unnecessary to shew, that most of the captures which England hath made of the vessels of neutral nations, ought not properly to be referred to it, but may be justified by another part of the said treaties, where it is declared,* "that all goods are contraband, which are carried to places blockaded or invested." The debate here would turn on the real existence of the blockade. To evince this, I might shew what opinion the Dutch had of a naval blockade in 1630†, when they pretended to have blocked up all the coast of Flanders, and openly avowed that they would take and condemn all neutral ships, which had the most distant appearance of being bound to the ports of that country; I might also shew their opinion of the same in 1689, when they declared‡ publicly to neutral nations, that they de-

* Art. 41, treaty of 1674, between Great Britain and Holland. The same article is found in every other commercial treaty.

† Convention between England and Holland, 1689.

‡ Placart of June 26, 1630.

signed to block up all the ports of France. I might observe, that as the possessions of the principal avenues to a town constitutes a blockade by land, and that it is not necessary, for this purpose, to have made a complete line of circumvallation: so by keeping great squadrons of ships of war cruizing constantly before the ports of an enemy, by destroying in this manner totally his trade, and preventing his fleets of war from ever venturing out, except now and then a ship or two by stealth, a blockade ought certainly to be considered as completely established by sea. I might farther prove the cause from its effects, and shew that the American islands at least have experienced all the consequences of such a situation, where want of communication with the mother country, distress and famine, fully declare that they have been invested. But as this topic may not perhaps relate to the case of every capture, and depends on the particular state of a variety of facts, I shall not dwell any longer upon it at present; the question hath here, I hope, sufficiently been argued on principles, which are plain and comprehensive, on those equitable regulations which nature hath established among nations, and on those particular contracts with which communities have bound themselves; and, as I before endeavoured to prove that neutral nations had no right, by the former of these obligations, to protect the property of the enemy, so now it has been shewn by what policy the Dutch first obtained this privilege,—by what treaties it hath since been taken from them,—and by what conduct they have lately forfeited whatever

might remain of this right. It hath also, I flatter myself, appeared with how little reason other neutral powers, under colour of any article in their treaties of commerce, have claimed the enjoyment of such a right. Upon the whole, therefore, I will now beg permission to conclude, that the naval power of England hath been conducted, during the present war, with no less justice than spirit,—that the faith of our sovereign is as spotless as his courage,—and that the honour of our country is unblemished.

The basis of just complaint being thus removed, those idle clamours which have been founded upon it by no means merit our attention; to charge England with ambition must appear so absurd to all who understand the nature of her government, that, at the bar of reason, it ought to be treated rather as calumny than accusation; possessed of every blessing which civil government can produce, she is open to no temptation with which ambition might seduce her; pursuits of that kind might possibly operate to the destruction of her constitution, and her system of happiness might be subverted by the augmentation of her power; it must always be the interest of England to protect the just rights of commerce, and to support those principles which promote the labours of mankind, since she herself can only be great from the virtuous industry of her people. To obtain the largest extent for the exertion of her industry, and for the operation of her commercial capital, is the point to which all her policy should tend; and if ever, forsaking these maxims, she should seek to enlarge her power by

any acts of ambitious injustice, may she then, for the welfare of the human race, cease to be any longer great or powerful! Her courts of maritime jurisdiction are more wisely calculated to preserve the freedom of navigation than those of any other country; as they are not subject to the control of her executive power, the passions of her princes or ministers can never influence the decisions of them, and foreign traders have, in favour of their property, all the security which the nature of the thing will admit,—the consciences of wise men determining upon matters of right, whom the threats of power cannot affect, and who are set free, as far as possible, from all bias and partiality,—and to the honour of the learned persons who at present preside in those courts, one impartial testimony shall here be produced in their favour, though treaties have expressly pointed out to all who may there think themselves injured, a regular method of redress before a superior tribunal, the merchants and freighters of Holland have never ventured as yet to bring to a hearing, or even to put into a way of trial, any one of the appeals which they have made from the determinations of these judges, giving hereby cause to presume that they made these appeals with no other intention but to delay the execution of the sentences; and, conscious of the invalidity of their rights, they have in this manner plainly confessed the real equity of those decisions which have been passed upon them. That amid the confusions of war some irregularities may be committed, is a misfortune too true to be denied, but which the circumstances of the case

render impossible to be wholly prevented; they are the consequences of all wars, not alone of the present. To destroy the trade of the enemy, it is necessary to employ privateers, which cannot always be kept under those strict rules to which a more regular force is subject; these maritime hussars may sometimes exceed their commissions, and be guilty of disorders, the authors of which cannot always be punished, because the nature of the fact renders the discovery of them difficult; but can the crimes of these be imputed to ministers, whose ears are always open to complaints, and who labour as much as possible to redress them? The privateers of England are already made subject to every restraint which naval policy hath as yet invented, to force them to conform to their duty; if, however, these are found insufficient, and if any more successful means can be discovered to prevent every unjust depredation, by which the evils of war may be diminished, confident I am that Great Britain will be the first to adopt them; let them be consistent only with the use of her naval power, and conformable to justice, the British legislature will enact such into a law, and the British ministry will attend most steadily to the execution of them.

But, after all, the wisest regulations on occasions like this, cannot be expected to answer fully the end proposed; the system of humanity is nowhere perfect, but in the intercourse carried on between nations its weakness is most apparent; the softer ties of natural affection among these have little effect, and no coer-

cive bands of power exist to regulate and control their passions. It is the virtue of governments alone on which the general prosperity depends, and treaties have no better sanction than what that virtue can give them. These were the principles from which I first commenced my discourse, by these the rulers of communities are instructed to amend, as far as possible, by their prudence, what nature hath left imperfect; ambition or avarice will augment the evil, moderation may prevent it; every little inconvenience must be patiently suffered, where a superior right makes it necessary; the love of our country should never induce us to act contrary to that love which we ought to bear to mankind, since the interests of both, if they are rightly pursued, will always be found consistent with each other.

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CONTROVERSY

CONCERNING THE

LAW OF NATIONS,

SPECIALLY RELATIVE TO

PRUSSIA'S ATTACHMENT

OF

BRITISH FUNDS,

BY WAY OF REPRISAL FOR

ENGLISH CAPTURES.

EDINBURGH:

THOMAS CLARK, LAW-BOOKSELLER.

MDCCCXXXVII.

EXPOSITION

OF THE

MOTIVES

FOUNDED UPON

THE UNIVERSALLY RECEIVED LAWS OF NATIONS, WHICH HAVE DETERMINED THE KING (OF PRUSSIA) UPON THE REPEATED INSTANCES OF HIS SUBJECTS, TRADING BY SEA, TO LAY AN ATTACHMENT UPON THE CAPITAL FUNDS WHICH HIS MAJESTY HAD PROMISED TO REIMBURSE TO THE SUBJECTS OF GREAT BRITAIN, IN VIRTUE OF THE PEACE-TREATIES OF BRESLAU AND DRESDEN;

AND TO PROCURE

OUT OF THE SAID CAPITALS TO HIS SAID SUBJECTS, AN INDEMNITY FOR THE LOSSES WHICH THEY HAVE SUSTAINED BY THE DEPREDATIONS AND VIOLENCES OF THE ENGLISH PRIVATEERS, EXERCISED UPON THEM ON THE HIGH SEAS.

By Louis [illegible]

LONDON:
PRINTED FOR J. RAYMOND.

PREFACE.

THE first portion of this number of the CABINET LIBRARY *of Scarce and Celebrated Tracts*, comprises a representation of the claims of the King of Prussia for certain violences and depredations alleged to have been committed by English Privateers on the Ships and Cargoes of Prussian Merchants. Prussia was a neutral nation during the war in which these grievances originated.

The captors, in vindication of their conduct, alleged that the cargoes of these ships consisted of articles contraband in war; but this allegation was denied on the part of Prussia, and indemnification was repeatedly, but unsuccessfully, sought for the losses which were sustained in consequence of detention and confiscation, though almost all the captured vessels were afterwards released.

The King of Prussia, at the instance of his subjects, declared his intention of indemnifying them out of certain monies which he held belonging to English subjects.

In 1738, the Emperor Charles VI. borrowed of certain persons in England, with his Britannic Majesty's permission, L. 250,000 at 6 per cent., and mortgaged the silver mines in Silesia for the repayment of it. By the Treaty of Breslau in 1742, the Queen of Hungary, then Empress, yielded up Silesia, including the silver mines, to the King of Prussia, who thereupon engaged to repay to the English the sums secured by the mortgage. This treaty was guaranteed by his Britannic Majesty. There remained a considerable part of this loan in the King of Prussia's hands, and instead of paying it to the parties from whom

it was originally borrowed, stopped it to make good the losses which his subjects sustained (during the late war between Spain and France against England) by our seizing their ships though they were afterwards released.* The tract is intended to prove that by this application, the King of Prussia has not violated the Treaties of Breslau, and consequently that the guarantee of the King of Great Britain and that of England, which it includes, remains entire.

The second portion of the Tract contains the celebrated answer of the Duke of Newcastle, by command of his Majesty the King of England, together with the opinion of Sir George Lee, Sir G. Paul, Sir D. Ryder, and W. Murray (afterwards Lord Mansfield). This Opinion is considered, by all competent judges, one of the most learned and masterly performances, in this department, of Public Law on record.

The Publisher has added at page 93-6, a select list of the most important works produced on the subject of Neutrality, from the middle of the last, down to the beginning of the present century, and he humbly hopes that, in reproducing this excellent Tract, which had become exceedingly scarce, he is conferring a real advantage on students of International Law.

* Mr Michell, his Prussian Majesty's Charge d'Affairs, notified to the Earl of Holderness, by order of the King his master, that the remainder of the principal and interest of the 7 per cent. Silesia loan, will be paid in a few days, and that part of the money is already lodged in the bank for that purpose. June 15. 1756.

EDINBURGH, 38. GEORGE STREET,
1st January 1837.

MEMORIAL

OF

Mr MICHELL,

SECRETARY TO THE LEGATION OF HIS MAJESTY THE KING OF PRUSSIA, PRESENTED TO THE DUKE OF NEWCASTLE.

It is by order of the King, his master, that the under-signed Secretary to the Legation of his Majesty the King of Prussia, is obliged to remind your Excellency of the pressing solicitations employed by himself and predecessor, at several times, for obtaining from the equity and through the justice of the Ministry of this Court, the satisfaction which the Prussian merchants have demanded, of being indemnified from the violences and depredations they have sustained from some of the English privateers during the last war. Your Excellency will remember that these merchants had some their ships taken from them, some their effects forced away, others had them detained; and, although it was evidently made appear that none of them dealt in contraband trade, they have not hitherto been able to obtain any redress, neither from the English tribunals, to whom they applied, nor from the Government before which they

laid their complaints; and that, by a singularly strange contradiction, when even those tribunals found no specious pretext for confiscating their ships and effects, and consequently discovered the injustice of the prize, they nevertheless did not fail to condemn the proprietors in costs to the behoof of the privateers, and leviable upon the capture.

The laws of equity ought incontestibly to be the same for all nations; and an Englishman ought to expect the finding a sanctuary at Berlin, in the justice of its tribunals, against the violence of their subjects, the same as a Prussian ought to find it at London, against any illegal procedure from theirs. It is upon this principle that good faith and mutual commerce stand established between nation and nation: It is also upon this very principle that the merchants of Europe traffic with their neighbours, and that the English nation carries on so advantageous a commerce. All countries look on these ties of equity as sacred and inviolable, and they respect them at home, that they may receive the benefit of them abroad, whenever the necessity comes to exist, of their having recourse to them.

His Majesty believed, that, with a nation so full of noble sentiments, so generous as the English one, it would be no difficulty to obtain for his subjects the satisfaction that was due to them; and your Excellency will remember, that, in case of a refusal, the intimation was not omitted, that his Majesty the King of Prussia would find himself obliged (though with regret) to seize the capital funds for which the Duchy

of Silesia stood mortgaged to the English, especially as his Majesty had no other means of indemnifying his subjects.

The intentions of the King, my master, are pure: His Majesty was determined to fulfil, with all integrity, the engagements he has contracted with the English nation, and acquit the debts incumbent on him; but he is determined at the same time to make good to his subjects the protection which he owes them.

That his Majesty might precipitate nothing in an affair of this nature, and, in order to afford the English Government time enough for reflection, his Majesty continued discharging the Silesian loan until payment of the last term; but, when his Majesty saw that neither the equity of his demands, that neither time, reasons, nor repeated importunities, produced any effect in favour of the Prussian merchants, the King thought himself obliged to have recourse to the last measure that remained in his power, that of defalcating from the money due to the English the sum which his subjects demanded for their indemnification.

The same law that obliges us to the fair dealing of paying our debts, authorizes us to exact the same measure of justice from our debtors. What a singularly strange institution of right would that be that should regulate all in favour of one side, and nothing in favour of the other? In this affair, however, the point in agitation is not even what is owing from the English to the Prussians, but what is forcibly with-

held from them. If it is but just to pay one's debts, it is yet more so to repair the damages one has occasioned by one's own fault, and with premeditated design.

After reasons so strong, after having in vain demanded reparation from those who alone could make it, is there any colour whatever for pretending that the King should give up his own subjects? And, could he do it even if he would? He owes the last term to the English; he stops it; and, after having acquainted the British Government, upon all occasions, of the measures his Majesty could not but indispensably take, he appointed a commission to judge with impartiality, and with a rigid exactness, the pretensions of the Prussian merchants. At the head of this commission, too, his Majesty placed a man, whom to name, suffices to sanctify the whole procedure, the High Chancellor (*Cocceii*), then three Ministers of State, and several Counsellors of Justice, have examined the claims of the merchants, and liquidated their just amount.

This commission having terminated this affair, the under-signer has the honour to present, enclosed herewith to your Excellency, copies of the decrees given upon the different claims of the Prussian subjects upon that of each merchant separately; whence it results, that of 239,850 crowns which those merchants esteemed due to them, the commission has adjudged to them no more than 159,486 crowns 20 Gr. Principal, and 33,283 crowns interest, at the rate of 6 per cent.

Though his Majesty has all the reason to be per-

suaded that the said commission has proceeded according to the forms of the most impartial justice, his Majesty has, nevertheless, ordered the under-signer to declare, in the present memorial, that his Majesty is disposed to have any contested facts examined afresh by the said commission, if any officers or English privateers who shall believe themselves wronged thereby, think proper to interfere therein, or to have the judgment reformed, in case the pleas of the adverse party so suing should be found valid.

The King fixes, for the exhibition of these pleas, the terms of three months, reckoning from the day of this declaration. As the list of the several captures annexed to this memorial, contains the names of those who made them, his Majesty refers it to the good pleasure of the British Government, in what manner it shall be proper to inform the parties of the judgments pronounced, that they may enter their pleas against it, according to right. If, nevertheless, the said term lapses without any one's interfering in their own vindication, his Majesty will abide by the decree of his council; and, in pursuance thereof, will order the defalcation of the sum adjudged to his subjects, including the interest thereon at 6 per cent. until the 10th of July of the current year; which said defalcation, so ordered from the money due to the English, amounts to 194,725 Brandenburg crowns, 4 gr. and 5 deniers, and is to be applied to the indemnification of the Prussian merchants. His Majesty, at the same time declares, that he is ready to order remittance to be made to the Commissioners of the Si-

lesia loan, of the residue of what is owing upon that claim, both on account of the capital, and of the interest growing thereon, at the rate of 7 per cent. to the 10th of July of the present year: Always provided that the said Commissioners shall issue an authentic release for the said principal and interest.

In case that, against all expectation, they shall, in England, refuse to come into this so equitable a disposition, I am to declare to your Excellency that the King will order the said sum to be judicially delivered to his Chamber of Justice in Berlin, there to remain in deposite, till it shall please the proprietors to draw it out by furnishing proper discharges; and, as the growth of the interest naturally ceases after this procedure, his Majesty expressly protests against being thenceforward accountable for any; and, in virtue of this authentic protest, his Majesty holds the debt upon the Silesia mortgage entirely extinguished, and that Duchy fully exonerated from all obligations with regard to it.

(Signed) MICHELL.

LONDON, *November* 23. 1752.

§ 1. War having been kindled between the English nation on one side, and the Kings of France and of Spain on the other; the King, for the better security of the commerce of his subjects, took the precaution of addressing to the Sieur Andrié, his Minister at London, an order, bearing date the 14th of April 1744, by which he charges him,

To inform himself from the English ministry, of

what specifically was held contraband with them, and whether grain, timber, planks, hemp, linseed, linen, and the like, were comprehended therein, that the King might advise his subjects thereof, and give them the necessary instructions upon the manner in which they should continue their commerce.

§ 2. The declaration which the Lord Carteret made to the Sieur Andrié, in the name of his Majesty the King of Great Britain, and of which he gave advice in his relation of the 18th of May 1744, imports,

That the King's flag should be respected equally with that of other powers in the alliance of Great Britain, excepting only such vessels as should carry warlike stores to the enemies of the British nation.

§ 3. The King having required a more explicit declaration upon all the subject-matters contained in the Memorial which his minister had presented thereon, the said Sieur Andrié, in his relation of the $\frac{29\text{th May,}}{9\text{th June,}}$ advised,

That the Lord Carteret, Secretary of State, had repeatedly assured him, N. B. in the name of the King of Great Britain, that *none of those articles* specified in the order given to the said Sieur Andrié, such as wood, and other materials for the construction of ships, neither also cordage, sails, hemp, linseed, and the like, were reputed contraband: That the English nation would carefully respect the flag and subjects of the King, and that the commerce of these last should not in the least be molested, provided they abstained from carrying any *warlike stores* to the enemies of Great Britain (which stores are N. B. N. B.

specified in all the treaties between the maritime powers), nor any *victualling stores* to places besieged or blockaded by the said nation.

That, for the rest, the commerce should remain free to the neutral powers, N. B. *upon the same footing as in times of peace.*

§ 4. It is proper to remark here, that when the said Sieur Andrié required from Lord Carteret a declaration thereon in writing, he answered him both the times he spoke to him of it, that it was not the practice in England.

§ 5. Lord Carteret having specifically referred for what is called contraband, to the treaties concluded between the maritime powers, the King superabundantly ordered the treaties concluded in 1674 between England and Holland to be examined; and it was found in them that all the particulars which Lord Carteret had declared to the Sieur Andrié to be contraband or non-contraband were specifically set forth; for, in the 3d article of the said treaty are named as contraband,

> Arms, bombs, and all that belongs to them, powder, fire-arms, mortars, balls, sabres, lances, petards, arquebuses, grenadoes, saltpetre, cuirasses, and other accoutrements of war; as also soldiers, horses, saddles, &c.

And, by the 4th article, in the number of non-contraband are comprised,

> Cloths, wool, *flax*, clothing, shirts, tin, lead, coals, all sorts of *grains*, tobacco, spice, salt meat, cheese, butter, wine, salt, and all sorts of provi-

sions, masts, *planks, timber*, and other *wood* fitting, N. B. N. B. for building and repairing ships, and, in general, *all merchandise* not comprehended in the preceding description ; insomuch that it is permitted to allies to transport these last articles of merchandise to the enemies' places, excepting only, N. B. such as should be actually under the circumstances of a siege or blockade.

It is certain, that, in the preceding wars, the English nation held for contraband *precisely no other articles but what were for the direct use of war.*

§ 6. In consequence of this declaration, which the King communicated to his subjects, he gave them direction that, in *warlike stores* excepted, they might freely trade as in time of peace.

§ 7. The English privateers, for more than one year, respected the Prussian flag, and suffered to pass without hinderance all the vessels of that nation, even those which were loaded with plank.

It was not till October 1745 that, for the first time, they took it into their heads to stop vessels loaded with plank for France, and would not let any timber pass ; but the depredation was at length pushed so far, that the privateers, although the said vessels were loaded with no other than merchandise visibly free, and that their commanders assured them of it, by the exhibition of their sailing orders, bills of lading, and certificates, not content with stopping them, they took from them all that they found for their purpose, and carried them forcibly into their ports.

Amongst others it happened that a privateer having taken a ship belonging to Embden, loaded with salt, not satisfied with plundering the cargo, and the crew of their wearing apparel, he basely misused and beat them.

§ 8. The King, solicited by the repeated complaints of his subjects, having, on this occasion, ordered a number of representations to be made, as well by the said Sieur Andrié, as by the Sieur Michell, his Secretary to the Embassy, Lord Chesterfield, then Secretary of State, answered in writing, of the date of $\frac{\text{5th January 1747.}}{\text{26th December 1746.}}$

That the King of Great Britain, willing to omit no occasion of manifesting all the regard he had for the King of Prussia, made no difficulty of declaring that he would offer no hinderance to the navigation of the subjects of Prussia, so long as they should exercise their commerce in an allowable way, and *should conform to the ancient customs established and received between neutral powers.*

§ 9. And when, on the occasion of the capture of a Dutch ship, called the Three Sisters, the Secretary Michell made fresh representations, and demanded satisfaction thereon of Lord Chesterfield, that Lord declared to him, on the $\frac{\text{11th}}{\text{22d}}$ September 1747,

That the intention of Great Britain was, N. B. to keep to the declaration of Lord Carteret, made, N. B. N. B. in the name of his Britannic Majesty, to the said Sieur Andrié at the beginning of the war.

§ 10. Things, however, remained on the foot simply of these declarations, without the least satisfaction

having been given, either for the first damages and the insolence of the privateers, or for the depredations which went on increasing in the years 1747 and 1748, although the King had, at several times, ordered his declaration to be made, that he would make accountable for them those capital funds of the English which he had engaged himself to pay them, in acquittal of Silesia, by the treaties of peace of Breslau and Dresden, and that he would, out of them, indemnify his subjects.

§ 11. This is what, at length, has constrained the King to yield to the pressing instances and to the repeated solicitation of his subjects, to take their cause effectually in hand, to employ to that end those means, dictated as well by reason as by the law of nations; and, in a word, to repair his subjects' damages out of the capital funds of the English in his hands.

§ 12. But, that the whole universe may be plainly convinced of the unjustifiable and illegal procedure of the English privateers, the following questions shall be examined here, which are relative to the grievances of the Prussian subjects, and which will serve to state them in their full light. To wit,

1. Whether the English privateers had a right to stop the Prussian vessels on the high seas, to search them, and, notwithstanding the exhibition of their sailing orders and bills of lading, by which they proved they had no contraband on board, to carry them forcibly into the ports of England?

2. Whether the said English privateers were warranted to stop, on the high seas, the Prussian vessels,

under the pretext *that there was merchandise on board them that belonged to the enemies of the British nation?* And whether they had a right to carry them into their ports, and thereby retard the course of their navigation?

3. Whether the said privateers had a right to stop, on the high seas, other neutral ships, such as those of Sweden, Holland, Denmark, Hamburgh, &c. N. B. freighted, in the whole, or in part, by Prussian subjects, to carry them into England, to detain them whole years, and disturb in this manner the trade of the Prussian subjects?

4. Whether the sorts of merchandise, loaden upon Prussian bottoms, or on neutral ones, by the subjects of Prussia, and which were confiscated from them, in virtue of the unjust decrees given against them by the English tribunals, were really contraband?

5. Whether the English ministry had a right to refer to a Tribunal of Marine, established in England, the decision of differences of the nature of those examined in the preceding questions, when those differences are in agitation between two free powers, and to want to oblige the aggrieved power, who demands satisfaction, to abide by the decisions of such a tribunal?

6. Whether, in fine, on the other hand, the King is not fully justifiable in his giving way to the attachment which his subjects have requested him to lay on the English capital funds, stipulated by the peace-treaties of Breslau and Dresden, and which are in his hands, so as he may procure to his subjects their in-

demnity, and a suitable reparation for the violences exercised against them by the English privateers, in despite of the law of nations, and notwithstanding the formal declarations repeated by the English ministry, and whether the King has not a right to indemnify his subjects out of those capitals, seeing that justice has been so long denied them, which they were so well grounded to demand?

EXAMINATION OF THE FIRST QUESTION.

Whether the English privateers had a right to stop the Prussian vessels on the high seas to search them, and, notwithstanding the exhibition of their sailing orders and bills of lading, by which they proved they had no contraband on board, to carry them forcibly into the ports of England?

A. It appears by the appendixed piece marked A, that eighteen Prussian ships have been stopped by English privateers, in a manner equally unjustifiable and illegal, and that they were forcibly carried into England. This procedure is visibly contrary to the law of nature and of nations; according to which it stands a principle universally acknowledged by all reasonable countries, that the sea is in the number of those things called *res nullius*, or of which man cannot make himself master.—§ 5. Inst. de Rer. divis.

If, then, no one can attribute to himself the sovereignty and propriety of the sea, it naturally follows that the use of it is common to all men, and that no one has a right to debar another of it.—L. 2. § 1. ff. de rer. div.—§ 1. Inst. eodem. L. 13. § fin. ff. de

injur.—L. 3. § 1. Ne quid in loco public.—L. 13. ff. Comm. præd.

According to these principles, founded upon reason, all powers have an equal right to navigate freely, and to trade by sea.—L. 4. § 1. de rer. divis.—§ 1. Inst. eodem.—d. l. 13. fin.—L. 1. § 1. de acquir. rerum dominio.—L. 2. § 9. ff. ne quid in loco public.—L. 13. ff. Commun. præd.

§ 14. Without, however, even having recourse to the Roman civilians (by whom the law of nature and nations was perfectly understood), one might easily maintain this proposition by an infinite number of authorities and examples.—*Vid. Grot. in tractatu de Mare libero.*

But this would be superfluous, since the English nation itself has availed itself of it, in several circumstances. When the Spanish envoy Mendoza complained to the Queen Elizabeth, that English ships presumed to trade in the Indian Seas, that queen gave for answer,—

That she saw no reason that could exclude her, or other nations, from navigating to the Indies, since she did not acknowledge any prerogative that Spain might claim to that effect, and much less any right in it to prescribe laws to those who owed it no obedience, or to debar them trade: That the English navigated on the ocean, the use of which was like that of the air, common to all men, and which, by the very nature of it, could not fall within the possession or property of any one.—*Cambd. in Vit. Eliz.* ad. ann. 1580, p. m. 328, *seq.*

§ 15. In consequence of this principle, founded upon the law of nature and of nations, the English nation has, in several conjunctures in which their ships have been stopped, searched, and seized, warmly protested against, and taxed such proceedings of being a manifest violation of the law of nations.

There is no doubt but that the English nation will recal to mind the great stir it made, when the King of Sweden, in a war against Russia, laid an embargo on all the English vessels that were bound for the ports of Livonia, and occasioned thereby a considerable prejudice to their trade. Then it was they appealed loudly to the laws of nations.

According to which, they maintained, that it was allowable for the subjects of England to trade with all states who were as to them neutral, although they might be involved in war with other powers, also neutral as to them; in like manner as the English permitted the subjects of Sweden to navigate and trade with all other states, and all other ports, that were neutral as to Sweden, although involved in war with England; which was evident, in this very circumstance, that they, at that time, permitted the subjects of Sweden to trade freely with France and Spain, which were, at that time, actually in open war with England.

This example is so much the more favourable to the subjects of Prussia, in that those Swedish vessels were for the most part loaded with contraband, and that they carried things such lengths, as to convey even ships of war to the enemies.

§ 16. What a long, bloody, and expensive war has not England maintained against Spain, for the defence of the liberty of its trade and navigation, because the Spaniards searched their ships in the American seas, for prevention of contraband trade?

In the declaration of war of the 30th of October 1739, England, after a deduction of its grievances against Spain, thus explains itself:—

That all these grievances took their rise from Spain attributing to itself, against all reasons, the right of stopping and searching the English ships, a pretension contrary to the right of navigation, which belonged equally to the English, as well as to the Spaniards; and consequently contrary to the laws of nations.

Upon this foundation, England, in its above declaration of war, taxes this pretension with being ill-grounded, unjust, dangerous, so as to affect all the powers of Europe; and, in the memorial which afterwards appeared on its behalf, it is maintained, that Spain ought to content itself with simply the presentation to be made by the English ships of their usual clearances and bills of lading; and it is upon that point, that to this instant turn the complaints of the British nation against the Spanish guard-ships.

§ 17. These principles evidently demonstrate the right of the Prussian subjects, and carry the greater force against the English privateers, in that England, with regard to Spain, had its hands tied up by several treaties of peace and commerce with that crown; whereas, no such treaty having existed between Prus-

sia and England, the affair cannot, nor ought to be discussed, but according to the laws of nations.

§ 18. All that could be granted to the English nation, would extend to no more than permitting its privateers to inform themselves, from the neutral ships they should meet with at sea, bound either for Spain or France, whether they had or not any contraband on board, &c. But there was no sort of necessity for searching such ships, and yet less for carrying them forcibly into the ports of England, and there detaining them whole years. The privateers, then, had no other right, beyond requiring the exhibition of their usual clearances, bills of lading, or certificates, whereby to discover whether they carried any contraband articles.

For the support of which practice, it is here relied on the very principles which Great Britain itself established in its difference with Spain, and in consequence of which it maintained, that Spain ought to have contented itself with the exhibition of the usual clearances, and certificates to its cruizers.

§ 19. And as the laws of nations are chiefly established by the examples, and by the treaties of the maritime powers, it is here appealed to the most celebrated treaties concluded between the said powers, and in which it is agreed on all sides to act in this manner. Thus it is provided in the treaties between England and Holland, in the years 1667 and 1668, art. 20.—*Du Mont. Corps Diplom.* vol. vii.

And the treaty of the year 1674, in the fifth article, as stands expressed as follows:—

When a Dutch ship bound for an enemy's port, shall, on the high sea, meet with English ships, it shall bring to, at a certain distance, and the English ship shall send its boat, out of which two or three men shall go on board, and make the captain or master produce his usual clearances and certificate, to satisfy whether there is any contraband on board.

§ 20. Sound reason dictates sufficiently, that without this precaution, and if it was allowable for privateers to attack a neutral ship with open force, to break open and stave trunks and chests, to drag them violently away into the ports of England, notwithstanding the proof by their certificates of having no contraband on board, there is no such thing as forming to one's self the idea of a free trade. And indeed what neutral nation would run the risk of trading, if it was to foresee that, after having recovered the release of its ships, there was no reparation to expect for the damages, charges, or insolences they should have undergone; and should, moreover, see those neutral ships condemned to pay to the privateers the costs of their capture, &c. Can a commerce thus liable be called a free one? If the Prussian merchants were to have been obliged to carry on their trade upon such a footing, the loss in all must certainly have outbalanced the profit; and if the wars had lasted longer, they must have renounced common sense, had they continued so ruinous a commerce.

§ 21. The ministry has expressly declared, that the freedom of trade with regard to neutral ships, should subsist *upon the same footing as in time of peace*, ex-

cepting only warlike stores. In time of peace, ships are not stopped in their course, much less forced into the ports of England.

§ 22. The consequences naturally deducible from the above, are, that the subjects of Prussia have by no means been suffered to carry on a free trade, as in time of peace, notwithstanding the laws of nature and nations, and the positive assurances given by the English ministry; but that, on the contrary, the trade of the said subjects has been ruined; and that, consequently, the English privateers are accountable for the reparation of the damages which they have caused to the subjects of the king.

§ 23. England cannot object to this consequence, since, as above remarked, itself has treated, as a violation of the laws of nations, the procedure of the Spaniards; when these, not contented with the exhibition of the usual clearance and certificates, have stretched their office to the search of the ships themselves.—*See* § 16.

QUEST. II.—Whether the said English privateers were warranted to stop, on the high seas, the Prussian vessels, under the pretext that there was merchandise on board them, that belonged to the enemies of the British nation? And whether they had a right to carry them into their ports, and thereby retard the course of their navigation?

§ 24. One of the most trying grievances of the Prussian subjects consists, in that their ships loaded in France, were, on their return home, stopped on the

high seas, and carried by the English privateers into the ports of England: that, after being detained there a certain time, they were, it is true, released; but that the French merchandise found on board was confiscated, or at least it was exacted from the crew, that it should make proof of the said merchandise, being the property of the Prussian subjects: that it was not given them in commission by French merchants, and that these had not charged themselves with the risk, &c.

§ 25. This conduct is not only contrary to the laws of nations, but also to all the treaties that were ever concluded between maritime powers.

First, because if, as without doubt it is, free for the subjects of Prussia, not only according to the laws of nations, but according to the formal acknowledgment of the English ministry, to trade with Spain and France, it necessarily follows from thence, that the said traffic must be general, and might be carried on either by purchase, by exchange, by taking French goods upon commission, &c.

Secondly, By a commerce, then, of this nature, no prejudice could be done to the English nation, since, with regard to ships upon their return, and bound for neutral ports, reasonably speaking, all contraband trade must be out of the question, which is the only exception that could here take place, either agreeably to the law of nations, or to the declaration of the English ministry.

Thirdly, It is incontestible that enemies, according to reason, and even to the law of nations, are in safety

one from the other, when they meet in a neutral place; and that, consequently, one enemy cannot attack another enemy in such a place, nor seize any of his effects. Now the Prussian ships, had they been freighted with effects belonging to the enemies of England, are a neutral place; thence it follows, that it is all one to carry off such effects from such neutral ships, as to carry them off from a neutral territory. This point of the law of nations sees itself confirmed by this remarkable maxim, expressly established in the treaties between England and Holland, and between England and France,—that *free ships render the merchandise on board free.*

Fourthly, It is proper to add here, that, conformably to the declaration of Lord Carteret, the trade of the Prussian subjects *was to continue as free as in time of peace.* Now, nobody can make a doubt, but that in time of peace it is allowed to every one to deal by exchange, by commission, &c.

Fifthly, All the treaties concluded between the maritime powers, are in this point perfectly agreeable to the laws of nations. The same will be found clearly stipulated in the eighth article of the treaty of 1667, between England and Sweden.—*Du Mont. Corps Diplom.* vol. vii. p. 37.

And in the eighth article of the treaty 1674 above cited, it is there expressly decided,

That the effects of an enemy on board of a neutral ship, should not be confiscated.

The same clause stands word for word repeated in the treaty of commerce of 1713, between England

and Holland, and between Holland and France.—*Du Mont.* vol. viii. p. 345, § 17; and p. 377, § 17.

And the reason given for it is, that already above recited, to-wit,

That free ships render the merchandise on board free,—a reason drawn from the law of nations.

§ 26. The king then sees himself perfectly well grounded in his exaction of a suitable reparation of the damages caused to his subjects, by the unjust procedure against, and detainment of, their ships, without its concerning him to inquire, whether the goods had been given upon commission to neutral places by French merchants, or whether or no these had taken upon themselves to run the risks.

QUEST. III.—Whether the said privateers had a right to stop, on the high seas, other neutral ships, such as those of Sweden, Holland, Denmark, Hamburgh, &c. *N. B.* freighted, in the whole or in part, by Prussian subjects, to carry them into England, to detain them whole years, and disturb in this manner the trade of the Prussian subjects?

§ 27. B. The appendixed piece, marked letter B, shews, that on the high seas there were stopped thirty-three neutral ships, in which the subjects of Prussia had an interest; and that the English privateers, instead of contenting themselves with the exhibition of their usual clearances and bills of lading, made by the captains, in proof of their having no contraband on board, carried them into the ports of England; there detained, at least many of them, whole years; and,

though they were at length released, they were nevertheless condemned in costs of capture to the privateers.

This procedure, which has disturbed the trade of the Prussian subjects, is not only in contradiction to the laws of nations, but diametrically opposite to the tenor of the declaration of the English ministry.

It is here presupposed, that all neutral ships had the same right as the Prussian ones; whence it follows, that it must be perfectly indifferent whether the Prussians loaded their goods on Prussian bottoms, or on neutral ones.

§ 28. The English ministry caused a general assurance to be given to the court of Berlin, that the liberty of trade should subsist, *N. B.* with regard to the neutral powers, on the same footing as in *time of peace*, (excepting warlike stores).

As, therefore, in time of peace, the subjects of Prussia used to load their goods upon other neutral bottoms, without any apprehension, unless they carried contraband articles, of their being to be carried into the ports of England; they continued, *bona fide*, their commerce upon the same footing, in full reliance on the declaration of England, of which the king had caused them to be informed.

§ 29. The said subjects of Prussia would never have loaded their goods upon those ships, could they have foreseen, that, against the laws of nations, against the principles acknowledged by England itself, and against the express declarations of its ministry, these would have stopped all neutral ships, whether they

had contraband articles on board or not; that they would detain them whole years in their sea-ports, and release them at length without any indemnification, and with even condemning them in the costs of the capture.

§ 30. Certain it is, that the English nation could not have devised a surer expedient for giving the finishing stroke to the commerce of the Prussian subjects, than to proceed against them in the manner it has done; whence it follows, that these are well warranted to claim a satisfaction proportionable to the damages and costs that have been caused to them by their unjust detainments.

QUEST. IV. — Whether the sorts of merchandise, loaden upon Prussian bottoms, or on neutral ones, by the subjects of Prussia, and which were confiscated from them, in virtue of the unjust decrees given against them by the English tribunals, were really contraband?

§ 31. The English privateers having confiscated upon three ships, Prussian or neuter, the rye and wood wherewith they were loaded (See forward, § 38), makes naturally room for the two following questions:

Were the said goods contraband or not? and

What is reputed contraband according to the law of nations?

It is an axiom of the law of nations, that a war between two powers cannot interrupt or hinder the commerce of neutral powers, with either the one or the other of those powers at war; neither can either of

these prohibit, to the power remaining neuter, the use of a free trade, to which it stands entitled by the law of nations; and that, consequently, the commerce of all sorts of merchandise is regularly and implicitly held allowable.

§ 32. There is in this case one only exception, and that is, when neutral powers should assume to carry to one of the parties at war, stores of war, which might be of prejudice to the other; and this is what is called contraband.

§ 33. The celebrated Grotius, in his Treaty upon the Laws of War and Peace, in his examination of this question, L. 3, C. i. § 4, N. 2, distinguishing between those sorts of merchandise that *serve solely in war*, and those that *serve both in war and out of war*. He ranks the *first sort* of merchandise amongst the contraband; but as to the *last*, he construes it such, in no other case, but when conveyed to places under an actual siege or blockade.

§ 34. Great Britain has in all times treated this matter in this very light, when asked by neutral powers to explain itself thereon.

When the war was kindled between Spain and Queen Elizabeth, the town of Lubec desiring to know what security it might have for its trade, and what sorts of merchandise it might be allowed to send to Spain? This Queen answered,

That whilst they abstained from sending arms, and other implements of war, they were at liberty to traffic in all other sorts of merchandise.—*Seld. Mar. Claus.* L. ii, cap. 30, p. 433.

The Sieur Bonel, Swedish commissary, received, in 1653, a like answer to a like question; when the Parliament of England gave him to understand,

That, in warlike stores excepted, they had no objection to the Swedes trading wherever they thought proper.—*Puff. Rer. Suec.* lib. 25, § 46.

§ 35. The English ministry, in its declaration to the minister of Prussia, made use of the proper terms of Grotius, and, at the first instance, declared, that *warlike stores alone* should be reputed contraband.—*See* § 2.

A declaration which was afterwards more particularly repeated, and in the following terms:—

That there was not the least intention towards opposing any obstacles to the commerce of the Prussian subjects, provided they abstained from conveying, to the enemies of the British nation, warlike stores (of which the specific articles are particularized in *N. B.* all the treaties of commerce between the maritime powers) and victualling stores, to places besieged or blockaded, &c.; and that, for the rest, the liberty of commerce was to subsist, with respect to the neutral powers, upon the same footing as in time of peace.—*See* § 3.

The English ministry did not confine itself to this, but specified, in detail, all the articles that were not contraband, as grain, wood, and all other materials employed in the building of ships, cordage, sails, flax, hemp-seed, linens, &c.

§ 36. All the treaties of navigation are explicit in fixing the definition of contraband on the same foot-

ing. Reference is here had to what has been said upon this subject in the fifth section above, and to the treaty of commerce, of 1674, concluded between England and Holland, there cited, and in which may be found, exactly particularized, what is contraband, and what free merchandise.

Both these sorts of merchandise are also pointed out, in the same terms, sections 19 and 20 of the treaty of commerce, concluded between England and Holland, in 1715.—*Du Mont.* vol. viii. p. 348.

§ 37. There are to be found treaties anterior to these two just cited, in which may be seen, particularized upon the same footing, what it is that does not come within the description of contraband.

Thus it is that, in the third section of the treaty of commerce between Sweden and Holland, nothing bears the appellation of contraband but *warlike stores alone;* and that, in the fourth section, money, all sorts of grain, salt, wine, oil, sails, cloths, hemp, all sorts of timber, and every thing serviceable towards the building of ships, anchors, &c. are ranked amongst the sorts of free merchandise.—*Du Mont. Corps Diplom.* vol. vii. part i, p. 67.

§ 38. It is enough to cast one's eye over the sorts of merchandise that were confiscated in England from the Prussian subjects, to convince one's self that there is not any of them, which, according to the laws of nations, according to all treaties of commerce, and *N. B. N. B.* according to the declaration of the English ministry, could pass for contraband.

For, out of a Prussian ship, called the *Twins*, they

confiscated a *cargo of wood*; out of a Dutch ship, the *Three Sisters*, another *cargo of wood*; and out of a Prussian ship, the *Golden Sun*, a *cargo of rye*; all articles of merchandise expressly excepted out of the contraband by the declaration of the English ministry.

§ 39. If the English ministry had, from the beginning, declared, that it considered these kinds of merchandise as contraband, the King would not have failed of warning his subjects not to risk the sending them, till the matter had been settled with the court of England; but the English ministry having positively declared, that it looked upon the said sorts of merchandise as free ones, and the King having communicated this declaration to his subjects, the said ministry can in nowise justify the procedure of their privateers.

§ 40. Vainly does the present English ministry seek to justify the procedure of their privateers, by a reason which equally shocks common sense, and the practice received amongst all well-ordered nations.

It is said that the preceding ministry had not authority, of its own head, to make such declarations, and to determine, contrary to the disposition of the laws of the country, what was contraband, or what was not so.

§ 41. It is appealed to the whole universe, whether it is allowable, between power and power, to make use of such subterfuges.

First, It is well known, that, as the custom is, princes never treat with the foreign envoys, but through means of their ministers. There is, then, a

necessity of giving credit to whatever these declare in the name of their masters, to the envoys who treat with them. But there is yet a greater necessity for it, when those ministers refuse, as upon this occasion, to explain themselves in writing.

Secondly, Moreover, the abovesaid declaration was not made by one minister only, but by two successive ones, at different times, and at both the times in the name of his Britannic Majesty. Can it then be presumed, that two ministers, whose integrity and patriot zeal are so universally acknowledged, could forget themselves to such a point, as to declare, in the name of their master, a thing upon which he had not given them his orders,—to deceive, in so unworthy a manner, a foreign allied power, and to lay such dangerous snares for the subjects of that power?

Thirdly, Besides, it has been shewn that the said ministers granted nothing but what, according to the laws of nations, and to all the treaties between the maritime powers, is ever ranked amongst the articles of free merchandise.

§ 42. True it is, that it has been observed, from certain decrees which have been issued from the English tribunals, that they had confiscated the cargoes of some neutral ships, upon which Prussian goods had been laden; and it should seem, at the first glance, that, in such a case, the subjects of Prussia had no right to exact reparation of damages from any but the masters or owners of the ship.

This is not denied; and it is even agreed to, that, if the neutral ship had carried any contraband trade,

the subjects of Prussia could not, with justice, have sought elsewhere for their indemnification. But, as they solemnly deny, as do likewise the masters of the said ships, that there was any contraband in the case, and that, by the decrees themselves of the English tribunals, it clearly appears, that the goods confiscated were in nowise contraband, this pretext can be of no service to the privateers, nor exempt them from repairing the damages they have caused.

§ 43. It stands, then, demonstrated, that the law of nations has been manifestly violated, in direct contravention, too, to the assurance given by the English ministry, when those neutral ships were stopt which carried no contraband articles, and whereby a very considerable damage has been occasioned to the Prussian subjects.

QUEST. V.—Whether the English ministry had a right to refer to the Tribunal of Marine, established in England, the decision of differences of the nature of those examined in the preceding questions, when those differences are in agitation between two free powers, and to want to oblige the aggrieved power, who demands satisfaction, to abide by the decisions of such a tribunal.

§ 44. The English ministry, in almost all the cases in which the ministers of Prussia made representations to them, upon the depredations and insolences committed upon the high seas against the subjects of Prussia, has declared to them,—

That the King of England had established in his

dominions courts of judicature, expressly to examine and decide, according to the laws of England, all the prizes upon which there was any contest, and to administer justice to every one; which courts would not fail of rendering justice to the subjects of Prussia, if their complaints were found well grounded: That, moreover, neither the King of Great Britain, nor his ministry, could alter or depart from the practice or constitution of government established in that country.

§ 45. Upon which, on this occasion, one cannot avoid asking the question,—By what right is it that the English ministry arrogates to itself that of taking any cognizance at all of such causes, and of exercising a kind of jurisdiction over a neutral sovereign, over his subjects and his ships, stopt in a place which does not belong to the dominion of England, and in which the Prussian ships have as much right as the English ones?

§ 46. With what an eye would England have beheld the King (of Prussia) in the last war of the north, seize indifferently all the English ships trading to the north; stop them on the high seas; search and carry them into his ports; afterwards refer to the decision of his college of Admiralty, whether they were good prizes or not; release them, without any amends, after a process of two or three years' standing, and condemn them, besides, to the payment of from 2000, 3000, to 4000 crowns, for charges of capture and costs of suit?

§ 47. When two powers have any differences between them, neither of them can, on either side, appeal to the laws of the country; because one of the

two parties does not acknowledge them. The affair, then, must be treated in the way of negotiation from court to court; and the difference can only be decided with the consent of both parties, according to the laws of nations, or by the means founded thereon.

§ 48. It would, however, have been extremely indifferent to the King, which of the two it had been, the English ministry or the tribunals of that nation, that should have rendered justice to his subjects; but as those tribunals, contrary to the laws of nature and nations, have not procured to the said Prussian subjects any reparation, it is to be believed that the English ministry is too reasonable not to judge from itself, that the King is, on his part, well grounded in his refusal to acknowledge the jurisdiction of the said tribunal to be a competent one, much less to submit himself to their unjust decisions.

§ 49. And as the English ministers have, as often as representations have been made to them in the name of the King, always obstinately stuck to their reference of these sort of affairs to the decision of their tribunals and of their laws, his Prussian Majesty enjoying, as he does, the same rights and prerogatives as his Britannic Majesty, has seen himself thereby constrained to commit, in his own dominions, the examination of the grievances of his subjects to his proper tribunals. To this end, the king has established a commission, composed of counsellors versed in the affairs of justice, as well as in those of commerce, with charge, under the direction of four of his ministers, to examine the grievances of his subjects according to

the universally received rights and laws of nations; and to state in conscience, and according to their duty, the exact nett sum to which the damages of his subjects may amount.

§ 50. This is, then, what the said commission has effectually executed. The commissioners have exacted legal proofs of the liquidation of every claim of costs; they have moderated, in an equitable manner, those articles which appeared overcharged; they have rejected the pretensions of those who could not verify them in form; and consequently they have acted in every thing, and rendered justice, without the least respect to persons, and with the greatest impartiality.

QUEST. VI.—Whether, in fine, on the other hand, the King is not fully justifiable in his giving way to the attachment which his subjects have requested him to lay on the English capital funds, stipulated by the peace-treaties of Breslau and Dresden, and which are in his hands, so as he may procure to his subjects their indemnity, and a suitable reparation for the violences exercised against them by the English privateers, in despite of the law of nations, and notwithstanding the formal declarations repeated by the English ministry: And whether the King has not a right to indemnify his subjects out of those capitals, seeing that justice has been so long denied them, which they were so well grounded to demand?

§ 51. It has been proved in the premises, that the subjects of the King had legal pretensions to form

against the English privateers. It has been shewn too, that, since the year 1745 to this instant, it has not been possible to obtain thereon any satisfaction from the English ministry; and it has been just now observed, that the King had ordered a commission, established in his dominions, to liquidate the exact amount of the said pretensions, which, N. B. is found to be 194,725 crowns, 14 gr. and 5 deniers, inclusive of the interest until the 10th of July 1752. There remains no more, then, than to examine the means by which may be procured to the Prussian subjects the satisfaction for, and indemnity of, their losses.

§ 52. It is a rule, founded both upon reason and upon the law of nations, that, when a sovereign denies to the subjects of another sovereign that justice which this last has required, and solicited of him to render to them, or when he does not do them due justice, as well that sovereign as his subjects are answerable for it, in their own special and personal name.— *Grot. de Jure Belli et Pacis*, L. 3. c. 2. § 2.

It has been established by the law of nations, that all the properties of the subjects of a state shall be like as mortgaged for what the, that state, or the head of the state, may owe directly, and upon their own account, or for so much as, for want of rendering due justice, they may have made themselves liable for the debt of others.— *Grot. de Jur. Bel. et Pac.* L. 3. C. 13. § 2. N. 2.

Not only the estate of the debtor is, as it were, mortgaged to the creditor, but also what belongs

to his subjects, who are implicitly answerable for the debt.—*Grot.* L. 3. C. 2. § 5. and 7.

In such case one may seize, or the persons, or the personal effects of the subjects of that sovereign who refuses to render justice. It is true, this is not authorized by the law of nature, but custom has almost every where established the practice of it.

Here he alleges sundry examples from antiquity.

§ 53. This principle of the law of nations is founded upon natural reason, because the subjects are implicitly held to approve the acts of their sovereign, and to subscribe to his judgment; whence it naturally follows that they are answerable for it, and that when all other means are wanting, it is to their personal property that recourse must be had.

§ 54. Now, since the King happens to have in his hands certain capital funds belonging to English subjects, and of which payment is due to them, in discharge of Silesia, no one can disapprove, that, in pursuance of the law of nations, and upon the instances made by his subjects, his Majesty should attach those funds, and employ them in their indemnification.

§ 55. The English ministry has so much the less room to exclaim, upon so moderate a measure being preferably taken, since themselves, in a similar case, and before having declared war against Spain, pursued it for several years together.

§ 56. With regret it is that the King sees himself under a necessity to come to this extremity, of which the consequences fall upon innocent members of a na-

tion, for which he has ever had all imaginable regard; an extremity to which he would never have had recourse, if he had had other means of procuring satisfaction to his subjects.

§ 57. The King, in acting thus, purely follows the rules dictated by the most correct justice. He cannot, without being wanting to his duties as a sovereign, and to his honour, refuse to protect effectually his subjects, who had not traded on the footing they had done, but for their confiding in the declaration, which had for its foundation the word passed by the English ministers.

§ 58. The English subjects (who are the most interested in this affair) will perhaps find means, by help of the Parliament, to inspire the English ministry with more equitable sentiments, or to compel the privateers to the real payment of the sums liquidated, for which they are accountable to the Prussian subjects; to which effect those subjects, from this instant, make over to the stock-holders in the Silesia-loan, all the demands they have on the said privateers.

§ 59. How the English ministry understands it, is past all comprehension, whilst they pretend that England would find itself disengaged from the guaranty of Silesia from that moment, that the payment of those funds (guaranteed to the English subjects by the treaties of peace of Breslau and Dresden, and in regard to which only that guarantee of Silesia had been granted) should be interrupted. It seems, that, in the case as it now stands, the English ministry has

afresh lost sight of the law of nations; for neither the preceding peace, nor the motive upon which that peace was concluded, are at all here concerned; but the matter in question is a *new* offence, committed after the conclusion of the peace by English subjects against those of the King; and it is this *new* injury that engages the King to make use of reprisals, towards obtaining satisfaction for it.

§ 60. It is clearly matter of fact, that it was not till after the peace of Breslau of 1742, and that of Dresden in 1745, confirmative of the precedent one (by which treaties the King engaged to pay off to English subjects more than one million of mortgage upon Silesia; and, on the other part, the King of Great Britain, as being comprehended in the said peace, took upon himself to be a guarantee of the said treaty). It was only then, I say, since that peace, that the English privateers began, notwithstanding the laws of nations, and the positive assurances of the ministry of that nation, to insult as well the Prussian ships as the neutral ones, upon which the Prussians had laden permittable merchandise, when they pillaged some, and forcibly dragged others into the ports of England; whence, after having detained them whole years, they released them at length, without making them any satisfaction for the damages and expenses their detainment had caused them, and with condemning them even in the costs of capture.

§ 61. The point then in question here is a *new* offence, and which does not draw its origin from the preceding war, nor has any connection with it, but

which purely of itself alone requires a *new* reparation.

§ 62. The King, towards obtaining reparation for this new offence, is authorized by the Law of Nations, to have recourse to the funds of the English subjects, which he happens to have in his hands, so long as his subjects shall not be indemnified. See above, § 52, 53.

§ 63. The preceding peace does not receive any attaint thereby, since, according to the Laws of Nations, the reparation of a new offence may be prosecuted *(Salva pace)* without interruption of a peace.

§ 64. The illustrious *Grotius* clearly decides this question, by a principle founded upon natural reason.

" It is a question" (says he) " that occurs every day, and is often debated, when it is that a peace may be looked upon as broken; for it is one thing, *N. B.* to furnish a new subject for war by a new offence, and another thing to break a peace."

He there brings in an example parallel to the case here examined.

" If it happens that, after a peace concluded, one of the contracting parties commits violence upon the subjects of the other, and consequently *offends that other afresh*, the peace does not, for all that, cease to subsist, but the party offended can, *N. B. N. B. Salva pace*, without violating that peace, recommence war upon this new motive." *Grotius* de Jure Bell. et Pac. l. 3. c. 20, § 28, et 32. And c. 20 § 32, and § 33 n. 3.

§ 65. If then a peace, concluded between two par-

ties at war, subsists even after that one of the contracting parties has suffered new acts of hostility on the part of the other; with how much more cogent a reason is not one to look upon that peace as subsisting, when it is only the mediator and guarantee of that peace, who, by a new injury, gives room to one of the contracting parties to lay an attachment upon certain things stipulated in that peace, until he shall have obtained satisfaction for this new injury?

§ 66. But, should any take it into their heads to maintain, against all reason, that at least such an attachment was to annul the guarantee promised in the treaties of Breslau and Dresden, nevertheless that which is stipulated in the 22d Article of the Peace of Aix-la-Chapelle, of the 18th of October 1748, would subsist always in its full force. In all events, the King would find himself equally disengaged on his side from the guarantee given by him, with regard to the succession of the reigning family in England, and of that of the Electoral States of Hanover.

§ 67. It is then clear, from all the foregoing, that, notwithstanding the attachment laid upon the English funds in the mortgage of Silesia, the Peace of Breslau, and consequently, the guarantee of the King of Great Britain, and that of England, which is comprehended in it, subsist entire: A guarantee, which the King, if occasion should offer, will very well know how to assert effectually in its proper season.

THE

DUKE OF NEWCASTLE'S

L E T T E R,

BY

HIS MAJESTY'S ORDER,

TO MONSIEUR MICHELL, THE KING OF PRUSSIA'S SECRETARY OF THE EMBASSY, IN ANSWER TO THE MEMORIAL AND OTHER PAPERS, DELIVERED BY MONSIEUR MICHELL TO THE DUKE OF NEWCASTLE, ON THE 23D OF NOVEMBER AND 13TH OF DECEMBER LAST.

LONDON:
Printed by EDWARD OWEN, in Warwick-Lane. 1753.

THE

DUKE OF NEWCASTLE'S

LETTER

BY

HIS MAJESTY'S ORDER,

TO MONSIEUR MICHELL, THE KING OF PRUSSIA'S SECRETARY OF THE EMBASSAY, IN ANSWER TO THE MEMORIAL, AND OTHER PAPERS, DELIVERED, BY MONSIEUR MICHELL, TO THE DUKE OF NEWCASTLE, ON THE 23D OF NOVEMBER, AND 13TH OF DECEMBER LAST.

SIR, *Whitehall, Feb.* 8. 1753.

I lost no time in laying before the King, the Memorial, which you delivered to me on the 23d of November last, with the papers that accompanied it.

His Majesty found the contents of it so extraordinary, that he would not return an answer to it, or take any resolution upon it, until he had caused both the memorial, and the *Exposition des Motifs*, &c. which you put into my hands soon after, by way of justification of what had passed at Berlin, to be maturely considered; and till his Majesty should thereby be enabled to set the proceedings of the Courts of

Admiralty here, in their true light; to the end that his Prussian Majesty and the whole world might be rightly informed of the regularity of their conduct; in which they appear, to have followed the only method, which has ever been practised by nations, where disputes of this nature could happen: and strictly to have conformed themselves to the law of nations, universally allowed to be the only rule, in such cases, when there is nothing stipulated to the contrary, by particular treaties between the parties concerned.

This examination, and the full knowledge of the facts resulting from it, will shew, so clearly, the irregularity of the proceedings of those persons, to whom this affair was referred at Berlin; that it is not doubted, from his Prussian Majesty's justice and discernment, but that he will be convinced thereof, and will revoke the detention of the sums assigned upon *Silesia*; the payment of which, his Prussian Majesty engaged to the Empress Queen to take upon himself, and of which the reimbursement was an express article in the treaties, by which the cession of that Duchy was made.

I, therefore, have the King's orders to send you the report, made to his Majesty, upon the papers above mentioned, by Sir George Lee, Judge of the Prerogative Court; Dr Paul, his Majesty's Advocate General in the Courts of Civil Law; Sir Dudley Ryder, and Mr Murray, his Majesty's Attorney, and Solicitor General. This report is founded on the principles of the Law of Nations, received and acknowledged by authorities of the greatest weight, in all

countries; so that his Majesty does not doubt but that it will have the effect desired.

The points, upon which this whole affair turns, and which are decisive, are,

First, That affairs of this kind are, and can be, cognizable only in the courts belonging to that power, where the seizure is made; and, consequently, that the erecting foreign courts, or jurisdictions elsewhere, to take cognizance thereof, is contrary to the known practice of all nations, in the like cases; and, therefore, a proceeding which none can admit.

Secondly, That those courts which are generally styled Courts of Admiralty, and which include both the inferior courts, and the Courts of Appeal, always decide according to the universal law of nations only; except in those cases where there are particular treaties between the powers concerned, which have altered the dispositions of the law of nations, or deviate from them.

Thirdly, That the decisions, in the cases complained of, appear, by the enclosed report, to have been made singly, upon the rule prescribed by the law of nations; which rule is clearly established, by the constant practice of other nations, and by the authority of the greatest men.

Fourthly, That, in the case in question, there cannot even be pretended to be any treaty that has altered this rule, or by virtue of which, the parties could claim any privileges, which the law of nations does not allow them.

Fifthly, That as, in the present case, no just

grievance can be alleged, nor the least reason given, for saying, that justice has been denied, when regularly demanded; and as, in most of the cases complained of, it was the complainants themselves who neglected the only proper means of procuring it; there cannot, consequently, be any just cause, or foundation, for reprizals.

Sixthly, That, even though reprizals might be justified by the known and general rules of the law of nations; it appears, by the report, and indeed from considerations which must occur to every body, that sums, due to the King's subjects by the Empress Queen, and assigned by her upon Silesia; of which sums his Prussian Majesty took upon himself the payment, both by the treaty of Breslau, and by that of Dresden, in consideration of the cession of that country, and which, by virtue of that very cession, ought to have been fully and absolutely discharged in the year 1745, that is to say, one year before any of the facts complained of did happen; could not, either in justice or reason, or according to what is the constant practice between all the most respectable powers, be seized, or stopt, by way of reprizals.

The several facts, which are particularly mentioned above, are so clearly stated, and proved, in the enclosed report, that I shall not repeat the particular reasons and authorities alleged in support of them, and in justification of the conduct and proceedings in question. The King is persuaded, that these reasons

will be sufficient also, to determine the judgment of all impartial people, in the present case.

It is material to observe, upon this subject, that this debt on Silesia, was contracted by the late Emperor Charles VI, who engaged, not only to fulfil the conditions expressed in the contract, but even to give the creditors such further security, as they might afterwards reasonably ask. This condition had been very ill performed by a transfer of the debt, which had put it in the power of a third person to seize, and confiscate it.

You will not be surprised, sir, that, in an affair, which has so greatly alarmed the whole nation, who are entitled to that protection, which his Majesty cannot dispense with himself for granting; the King has taken time, to have things examined to the bottom; and that his Majesty finds himself obliged, by the facts, to adhere to the justice and legality, of what has been done in his courts, and not to admit the irregular proceedings, which have been carried on elsewhere.

The late war furnished many instances, which ought to have convinced all Europe, how scrupulously the courts here do justice, upon such occasions. They do not even avail themselves of an open war, to seize, or detain, the effects of the enemy, when it appeared that those effects were taken wrongfully before the war. This circumstance must do honour to their proceedings; and will, at the same time, shew, that it was as little necessary as proper, to have re-

course elsewhere to proceedings, entirely new and unusual.

The king is fully persuaded, that what has passed at Berlin, has been occasioned, singly, by the ill-grounded informations, which his Prussian Majesty has received, of these affairs: And does not at all doubt, but that, when his Prussian Majesty shall see them in their true light, his natural disposition to justice and equity will induce him, immediately to rectify the steps, which have been occasioned by those informations; and to complete the payment of the debt charged on the Duchy of Silesia, according to his engagements for that purpose.

I am, with much consideration, Sir, your most obedient humble servant,

HOLLES NEWCASTLE.

TO THE KING'S MOST EXCELLENT MAJESTY.

May it please your Majesty,

In obedience to your Majesty's commands, signified to us by his Grace the Duke of Newcastle, we have taken the memorial, sentence of the Prussian Commissioners, and lists marked A and B, which were delivered to his Grace by Monsieur Michell, the Prussian Secretary here, on the 23d of November last; and also the printed *exposition des motifs, &c.* which was delivered to his Grace the 13th of December last, into our serious consideration. And we have directed the proper officer to search the registers of the Court of Admiralty, and inform us how

the matter appeared from the proceedings there, in relation to the cases mentioned in the said lists A and B, which he has accordingly done.

And your Majesty having commanded us to report our opinion, concerning the nature and regularity of the proceedings, under the Prussian commission, mentioned in the said memorial; and of the claim or demand pretended to be founded thereupon; and how far the same are consistent with, or contrary to, the law of nations, and any treaties subsisting between your Majesty and the King of Prussia, the established rules of Admiralty jurisdiction, and the laws of this kingdom:

For the greater perspicuity, we beg leave to submit our thoughts upon the whole matter in the following method:

1*st*, To state the clear established principles of law.

2*dly*, To state fact.

3*dly*, To apply the law to the fact.

4*thly*, To observe upon the questions, rules and reasonings alleged in the said memorial, sentence of the Prussian Commissioners, and *exposition des motifs, &c.* which carry the appearance of objections, to what we shall advance upon the former heads.

First as to the Law.—When two powers are at war they have a right to make prizes of the ships, goods, and effects, of each other, upon the high seas: Whatever is the property of the enemy, may be acquired by capture at sea; but the property of a friend, cannot be taken, provided he observes his neutrality.

Hence the law of nations has established,

That the goods of an enemy, on board the ship of a friend, may be taken.

That the lawful goods of a friend, on board the ship of an enemy, ought to be restored.

That the contraband goods, going to the enemy, though the property of a friend, may be taken as prize; because supplying the enemy, with what enables him better to carry on the war, is a departure from neutrality.

By the maritime law of nations, universally and immemorially received, there is an established method of determination, whether the capture be, or be not, lawful prize.

Before the ship, or goods, can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon as prize, in a Court of Admiralty, judging by the law of nations and treaties.

The proper and regular court, for these condemnations, is the court of that state to whom the captor belongs.

The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, viz. the papers on board, and the examination on oath of the master and other principal officers; for which purpose, there are officers of Admiralty in all the considerable sea-ports of every maritime power at war, to examine the captains, and other principal officers of every ship, brought in as prize, upon general and impartial inter-

rogatories: If there do not appear from thence ground to condemn, as enemies' property, or contraband goods going to the enemy, there must be an acquittal, unless, from the aforesaid evidence, the property shall appear so doubtful, that it is reasonable to go into further proof thereof.

A claim of ship, or goods, must be supported by the oath of somebody, at least as to belief.

The law of nations requires good faith: Therefore every ship must be provided with complete and genuine papers; and the master at least should be privy to the truth of the transaction.

To inforce these rules, if there be false or colourable papers; if any papers be thrown overboard if the master and officers examined in *præparatorio* grossly prevaricate; if proper ship's papers are not on board; or if the master and crew cannot say, whether the ship or cargo be the property of a friend or enemy; the law of nations allows, according to the different degrees of misbehaviour, or suspicion arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received by the claimant, in case of acquittal and restitution. On the other hand, if a seizure is made, without probable cause, the captor is adjudged to pay costs and damages: For which purpose, all privateers are obliged to give security for their good behaviour; and this is referred to, and expressly stipulated by many treaties.*

* Treaty between England and Holland, 17th February 1668, Art. 13.—Treaty 1st December 1647, Art. 10.—Treaty between

Though from the ship's papers, and the preparatory examinations, the property do not sufficiently appear to be neutral, the claimant is often indulged with time, to send over affidavits to supply that defect: If he will not shew the property by sufficient affidavits, to be neutral, it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship, the captor is justified in bringing her in, and excused paying costs, because he is not in fault; or, according to the circumstances of the case, may be justly intitled to receive his costs.

If the sentence of the Court of Admiralty is thought to be erroneous, there is in every maritime country a superior court of review, consisting of the most considerable persons, to which the parties, who think themselves aggrieved, may appeal; and this superior court judges by the same rule which governs the Court of Admiralty, viz. the law of nations, and the treaties subsisting with that neutral power, whose subject is a party before them.

If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive.

This manner of trial and adjudication is supported, alluded to, and inforced, by many treaties *.

England and France at St Germains, 24th February 1677, Art. 10.—Treaty of commerce at Ryswick, 20th September 1697, between France and Holland, Art. 30.—Treaty of commerce at Utrecht, 31st March 1713, between Great Britain and France, Art. 29.

* As appears with respect to Courts of Admiralty adjudging the prizes taken by those of their own nation, and with respect to the witnesses to be examined in those cases, from the following trea-

In this method all captures at sea were tried, during the last war, by Great Britain, France, and Spain, and submitted to by the neutral powers. In this method, by Courts of Admiralty acting according to the law of nations, and particular treaties, all captures at sea have immemorially been judged of, in every country of Europe. Any other method of trial would be manifestly unjust, absurd, and impracticable.

Though the law of nations be the general rule, yet it may, by mutual agreement between two powers, be varied or departed from; and where there is an

ties.—Treaty between England and Holland, 17th February 1668. Arts. 9 and 14.—Treaty 1st December 1674, Art. 11.—Treaty 29th April 1689, Arts. 12, 13.—Treaty between England and Spain, 23d May 1667, Art 23.—Treaty of commerce at Ryswick, 20th September 1697, between France and Holland, Arts. 26 and 31.—Treaty between England and France, 3d November 1655, Arts. 17 and 18.—Treaty of commerce between England and France at St Germains, 29th March 1632, Arts. 5 and 6.—Treaty at St Germains, 24th February 1677, Art. 7.—Treaty of commerce between Great Britain and France, at Utrecht, 31st March 1713, Arts. 26 and 30.—Treaty between England and Denmark, 29th November 1669, Arts. 23 and 34. Heineccius, who was Privy-Counsellor to the King of Prussia, and held in the greatest esteem, in his Treatise *de Navibus ob vecturam vetitarum mercium commissis*, cap. 2. sec. 17 and 18, speaks of this method of trial.

With respect to appeals or reviews: From Treaty between England and Holland, 1st December 1674, Art. 12, as it is explained by Art. 2 of the Treaty at Westminster, 6th February 1715–16.—Treaty between England and France, at St Germains, 24th February 1677, Art. 12.—Treaty of commerce at Ryswick, 20th September 1697, between France and Holland, Art. 33.—Treaty of commerce at Utrecht, 31st March 1713, between Great Britain and France, Arts. 31 and 32, and other Treaties.

alteration or exception, introduced by particular treaties, that is the law between the parties to the treaty; and the law of nations only governs so far as it is not derogated from by the treaty.

Thus, by the law of nations where two powers are at war, all ships are liable to be stopped and examined to whom they belong, and whether they are carrying contraband to the enemy: But particular treaties have enjoined a less degree of search, on the faith of producing solemn passports, and formal evidences of property, duly attested.

Particular treaties too have inverted the rule of the law of nations, and, by agreement, declared the goods of a friend, on board the ship of an enemy, to be prize; and the goods of an enemy, on board the ship of a friend, to be free, as appears from the treaties already mentioned, and may others.*

So likewise, by particular treaties, some goods, reputed contraband by the law of nations, are declared to be free.

If a subject of the king of Prussia is injured by, or has a demand upon any person here, he ought to apply to your Majesty's courts of justice, which are equally open and indifferent to foreigner or native: So *vice versa*, if a subject here is wronged by a person living in the dominions of his Prussian Majesty, he ought to apply for redress in the King of Prussia's courts of justice.

* Particularly by the aforesaid Treaty between England and Holland, December 1. 1674; and the Treaty of Utrecht, between Great Britain and France.

If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions.

The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, do not allow of reprizals, except in case of violent injuries, directed or supported by the state, and justice absolutely denied, *in re minime dubiâ*, by all the tribunals, and afterwards by the prince.*

Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprizals. Upon doubtful questions, different men think and judge differently: and all a friend can desire, is, that justice should be as impartially administered to him, as it is to the subjects of that prince, in whose courts the matter is tried.

Secondly, as to the Fact.—We have subjoined hereto two lists, tallying with those marked A and B which were delivered to his Grace the Duke of Newcastle, by Monsieur Michell, with the said memorial, the 23d of November last; and are also printed

* *Grotius de Jure Belli ac Pacis*, lib. 3. cap. 2. sec. 4. 5.

Treaty between England and Holland, July 31. 1667, Arts. 31. Reprisals shall not be granted, till justice has been demanded according to the ordinary course of law.

Treaty of commerce at Ryswick, September 20. 1797, between France and Holland, Art 4. Reprizals shall be granted, but on manifest denial of justice.

at the end of the said *exposition de motifs, &c.* From whence it will appear, that, as to the list A which contains eighteen ships and their cargoes,

4 If ever taken, were restored by the captors themselves, to the satisfaction of the Prussians, who never have complained in any court of justice here.

1 Was restored by sentence, with full costs and damages, which were liquidated at L. 2801 : 12 : 1 Sterling.

3 Ships were restored by sentence, with freight, for such of the goods as manifestly belonged to the enemy, and were condemned.

4 Ships were restored by sentence, but the cargoes, or part of them, condemned as prize, or contraband, and are not now alleged, in the lists A or B to have been Prussian property.

5 Ships and cargoes were restored by sentence, but the claimant subjected to pay costs, because, from the ship-papers, and preparatory examinations, there was ground to have condemned; and the restitution was decreed, merely on the faith of affidavits afterwards allowed.

$\frac{1}{18}$ Ship and cargo was restored by sentence upon an appeal, but, from the circumstances of the capture, without costs on either side.

There need no observations upon this list. As to the eight cases first above mentioned, there cannot be the colour of complaint.

As to the four next, the goods must be admitted to have been rightly condemned, either as enemy's

property, or contraband, for they are not now mentioned in the lists A or B.

If contraband, the ship could have neither freight nor costs, and the sentences were favourable, in restoring the ships, upon presumption, that the owners of the ships were not acquainted with the nature of the cargo, or owners thereof. If enemy's property, the ships could not be entitled to freight, because the bills of lading were false, and purported the property to belong to Prussians.

The ships could not be entitled to costs, because the cargoes, or part of them, being lawful prize, the ships were rightly brought in.

As the six remaining ships and cargoes were restored, the only question must be, upon the paying or not receiving costs, which depends upon the circumstances of the capture, the fairness of the ship's documents, and conduct of her crew; and neither the Prussian commissioners, the said memorial, or said *exposition des motifs, &c.* allege a single reason, why, upon the particular circumstances of these cases, the sentences were wrong.

As to the list B. Every ship, on board which the subjects of Prussia claim to have had property, was bound to, or from a port of the enemy; and many of them appeared clearly to be, in part, laden with the goods of the enemy, either under their own, or fictitious names.

In every instance, where it is suggested that any part of the cargo belonged to a Prussian subject, though his property did not appear from the ship's

papers, or preparatory examinations, which it ought to have done, sufficient time was indulged to that Prussian subject, to make an affidavit, that the property was *bona fide* in him: And the affidavit of the party himself, has been received as proof of the property of the Prussian, so as to entitle him to restitution.

Where the party will not swear at all, or swears evasively, it is plain he only lends his name, to cover the enemy's property, as often came out to be the case beyond the possibility of doubt.

It appears by a letter $\frac{29\text{th May}}{9\text{th June}}$ 1747, from Monsieur Andrie to his Prussian Majesty, exhibited in a cause, and certified to be a true extract by Monsieur Michell under his hand, that this colourable manner, of screening the goods of the enemy, was stated in the following words:

"Your Majesty's subjects ought not to load on board neutral ships any goods really belonging to the enemies of England, but to load them for their own account, whereby they may safely send them to any country they shall think proper, without running any risk: Then, if privateers commit any damage to the ships belonging to your Majesty's subjects; *you may depend on full justice being done here, as in all the like cases hath been done.*"

List B, contains thirty-three cases.

2—Two of them never came before a court of justice in England, but (if taken) were restored by the captors themselves, to the entire satisfaction of the owners.

16—In sixteen of them, the goods claimed by the

Prussian subjects, appear to have been actually restored, by sentence, to the masters of the ships in which they were laden; and, by the customs of the sea, the master is in the place of the lader, and answerable to him.

14—In fourteen of the cases, the Prussian property was not verified by the ship's papers, or preparatory examinations, or claimant's own affidavit, which he was allowed time to make.

$\frac{1}{15}$—And the other cause, with respect to part of the goods, is still depending, neither party having moved for judgment.* And so conscious were the claimants that the Court of Admiralty did right, that there is not an appeal, in a single instance, in List B, and but one in List A.

Thirdly, to apply the law to the Fact.—The sixth question in the said *Exposition des Motifs, &c.* states the right of reprisals to be, *Puisqu'on leur a si long tems denié toute la justice, qu'ils etoient fonds de demander.*

The said memorial founds the justice and propriety of his Prussian Majesty's having recourse to reprisals; because his subjects "*n'ont pu obtenir jusqu'à present aucune justice des Tribunaux Anglois qu'ils ont reclamés, ou du gouvernment auquel ils ont porté leurs plaintes.*" And in another part of the memorial it is put, *apres avoir en vain demandé des reparations de ceux qui seuls pouvoient les faire.*

* The Prussian has since applied for judgment on the 27th of January, and obtained restitution.

The contrary of all which is manifest from the state, and lists hereto annexed.

In six of the cases specified, if such captures ever were made, the Prussian subjects were so well satisfied with the restitution made by the captors, that they never complained in any court whatsoever of this kingdom.

The rest were judged of, by a Court of Admiralty, the only proper court to decide of captures at sea, both with respect to the restitution, and the damages and costs; acting according to the law of nations, the only proper rule to decide by. And justice has been done by the Court of Admiralty so impartially, that all the ships alleged in List A, to have been Prussian, were restored; and all the cargoes mentioned in either List, A or B, were restored, excepting fifteen, one of which is still undetermined.

And, in all the cases in both Lists, justice was done, so entirely to the conviction of the private conscience of the Prussian claimants, that they have acquiesced under the sentences, without appealing; except in one single instance, where the part of the sentence complained of was reversed.

Though the Prussian claimants must know, that, by the law of nations, they ought not to complain to their own sovereign till injustice, *in re minime dubia*, was finally done them, past redress; and though they must know that this rule of the law of nations held more strongly upon this occasion, because the property of the prize was given to the captors, and ought therefore to be litigated with them. The Prus-

sian, who, by his own acquiescence, submits to the captors having the prize, cannot afterwards with justice make a demand upon the state. If the sentence was wrong, it is owing to the fault of the Prussian that it was not redressed. But, it is not attempted to be shewn even now, that these sentences were unjust in any part of them, according to the evidence and circumstances appearing before the Court of Admiralty, and that is the criterion.

For as to the Prussian Commission to examine these cases *ex parte*, upon new suggestions, it never was attempted in any country of the world before. Prize or not prize must be determined by Courts of Admiralty, belonging to the power whose subjects make the capture. Every foreign prince in amity has a right to demand that justice shall be done his subjects in those courts, according to the law of nations, or particular treaties, where any are subsisting. If, *in re minime dubiâ*, these courts proceed upon foundations directly opposite to the law of nations or subsisting treaties, the neutral state has a right to complain of such determination.

But there never was, nor ever can be, any other equitable method of trial. All the maritime nations of Europe have, when at war, from the earliest times, uniformly proceeded in this way, with the approbation of all the Powers at Peace. Nay, the persons acting under this extraordinary and unheard of commission from his Prussian Majesty, do not pretend to say, that in the four cases of goods condemned here, for which satisfaction is demanded in List A, the

property really belonged to Prussian subjects. But they profess to proceed upon this principle, evidently *false*, that, though these cargoes belonged to the enemy, yet being on board any *neutral ship*, they were not liable to inquiry, seizure or condemnation.

Fourthly, From the questions, rules, reasonings and matters alleged in the said memorial, sentence of the Prussian Commissioners, and Exposition des Motifs, &c., the following propositions may be drawn, as carrying the appearance of objections, to what has been above laid down.

First Proposition.—That, by the law of nations, the goods of an enemy cannot be taken on board the ship of a friend; and this the Prussian Commissioners lay down as the basis of all they have pretended to do.

Answer.—The contrary is too clear to admit of being disputed. It may be proved by the authorities of every writer upon the law of nations; some of different countries are referred to.* It may be proved

* *Il Consolato del Mare*, cap. 273, expresly says, The enemy's goods found on board a friend's ship shall be confiscated. And this is a book of great authority.

Grotius *de Jure Belli ac Pacis*, lib. iii. cap. 1. sect. 5. numero 4 in the notes, cites this passage in the *Il Consolato*, and in his Notes, lib. iii. cap. 6. sect. 6.

Loccenius *de Jure Maritimo*, lib. ii. cap. 4. sect. 12.

Voet *de Jure Militari*, cap. 5. nu. 21.

Heineccius, the learned Prussian before quoted, *de Navibus ob Vecturam vetitarum Mercium commissis*, cap. 2. sect. 9. is clear a nd explicit upon this point.

Bynkershoeck *Quæstiones Juris Publici*, lib. i. cap. 14. per totum.

by the constant practice, ancient and modern; but the general rule cannot be more strongly proved than by the exceptions which particular treaties have made to it.*

Second Proposition.—It is asserted that Lord Carteret, in 1744, by two verbal declarations, gave assurances in your Majesty's name, that nothing on board a Prussian ship should be seized, except contraband; consequently, that all effects, not contraband, belonging to the enemy, should be free, and that these assurances were afterwards confirmed in writing by Lord Chesterfield, the 5th of January 1747.

Answer.—The fact makes this question not very material, because there are but four instances in lists A or B where any goods on board a Prussian ship have been condemned; and no satisfaction is pretended to be demanded for any of those four cargoes in lists A and B. However, it may be proper to shew how groundless this pretence is.

* Zouch (an Englishman) in his book *de Judicio inter Gentes*, pars 2. sect 8. numero 6.

Treaty between Great Britain and Sweden, 23d October 1661. Art. 12 and 13. Treaty between Great Britain and Denmark, 29th November 1669, art. 2d; and the passport or certificate, settled by that treaty, are material as to this point.

* Treaty between France and England, 24th Feb. 1677, Art. 8. Treaty of Utrecht between France and England, 1713, Art. 17. Treaty between England and Holland, 17th Feb. 1668, Art. 10. Treaty between England and Holland, 1st December 1674, Art. 8. Treaty between England and Portugal, 10th July 1654, Art. 23. Treaty between France and the States General, at Utrecht, 11th April 1713, Art. 26.

Taking the words alleged to have been said by Lord Carteret, as they are stated; they don't warrant the inferences endeavoured to be drawn from them They import no new stipulation different from the law of nations; but expressly profess to treat the Prussians, upon the same foot with the subjects of other neutral powers under the like circumstances, *i. e.* with whom there was no particular treaty. For the reference to other neutral powers cannot be understood to communicate the terms of any particular treaty. It is not so said; the treaties with Holland, Sweden, Russia, Portugal, Denmark, &c. all differ. Who can say which was communicated? There would be no reciprocity; the King of Prussia don't agree to be bound by the clauses to which other powers have, by their respective treaties, agreed. No Prussian goods, on board an enemy's ship, have ever been condemned here; and yet they ought, if the treaties with Holland were to be the rule between Great Britain and Prussia; nay, if these treaties were to be the rule, all now contended for, on the part of Prussia, is clearly wrong; because, by the treaty, the Dutch, in the last resort, are to apply to the Court of Appeal here.

Treaty of Alliance between Great Britain and Holland, at Westminster, the 6th of February 1715–16, *Article* 2.

" Whereas some disputes have happened touching the explanation of the 12th article of the Treaty Marine in 1674, it is agreed and concluded, for deciding any difficulty upon that matter, to declare, by

these presents, that by the provisions mentioned in the said article, are meant those which are received by Custom in Great Britain and in the United Provinces, and always have been received, and which have been granted, and always are granted, in the like case, to the inhabitants of the said countries, and to every foreign nation."

Lord Carteret is said twice to have refused, in which Monsieur Andrié acquiesces, to give any thing in writing, as not usual in England.

Supposing the conversations to mean no more than a declaration of course, that justice should be done to the Prussians, in like manner as to any other neutral power with whom there was no treaty; there was no occasion for instruments in writing, because in England the Crown never interferes with the course of justice. No order or intimation is ever given to any judge. Lord Carteret therefore knew, that it was the duty of the Court of Admiralty to do equal justice, and that they would, of themselves, do what he said to Monsieur Andrié.

Had it been intended, by agreement, to introduce, between Prussia and England, a variation in any particular from the law of nations; and, consequently, a new rule for the Court of Admiralty to decide by, it could only be done by a solemn treaty in writing, properly authorized and authenticated. The memory of it could not otherwise be preserved; the parties interested, and the Court of Admiralty, could not otherwise take notice of it.

But Lord Chesterfield's confirmation, in a letter of

the 5th of January 1747 being relied upon, the books of the Secretary's Office have been searched, and the letter to Monsieur Michell is found, which is *verbatim* as follows:

TRANSLATION of the Earl of CHESTERFIELD'S Letter to Mons. MICHELL.

SIR, *Whitehall, Jan.* 5. 1747–8.

HAVING had the honour to receive the King's orders upon the subject of the memorial which you delivered to me on the 8th instant, N. S., I would not delay informing you, that his Majesty, in order to omit nothing, whereby he may shew his attention to the King your master, makes no difficulty in declaring, that his Majesty has never had, or will have, any intention to give any interruption to the navigation of the Prussian subjects, as long as they shall take care to carry on their commerce in a lawful manner, and conformable to the ancient usage, as established and acknowledged amongst neutral powers.

His Prussian Majesty cannot be ignorant, that there are treaties of commerce actually subsisting between Great Britain and certain neutral states, and that by means of the engagements formally contracted on each side by those treaties, every thing relating to the manner of reciprocally carrying on their commerce has been finally settled and regulated.

At the same time, it does not appear that any such treaty exists at present, or ever did exist, between his Majesty and the King of Prussia; nevertheless, that has never hindered the Prussian subjects being

favoured by England, with respect to their navigation, as much as other neutral nations; and his Majesty does not suppose, that the King your master means to require distinctions from his Majesty, much less any preferences, in favour of his subjects in this point.

His Prussian Majesty is too well informed, not to know, that there are in this Government fixed and established laws, which cannot be departed from; and that in case any English ships of war should commit the least injustice to the trading subjects of the King your master, here is a tribunal, viz. the High Court of Admiralty, where they have a right to apply, and make their complaints; and they may be previously assured, that, in such case, impartial justice will be administered to them; the juridical proceedings of the said Court being, and having ever been unimpeached and irreproachable, as appears by numerous examples of neutral vessels illegally taken, having been restored, with costs and damages, to the proprietors.

This is the answer the King has ordered me to give, upon the contents of your said memorial; and his Majesty cannot but flatter himself, that, in consequence hereof, the King your master's desire will be fully answered, with relation to the point in question; and of which his Majesty is the more assured, as he is persuaded that the King of Prussia would not require any thing but what is equitable.

I am, with much consideration, Sir, your most obedient, and most humble servant,

CHESTERFIELD.

There need no observations. It is explicit, and in express terms puts Prussia upon the foot of other neutral powers with whom there was no treaty, and points out the proper way of applying for redress.

The verbal declarations made by Lord Carteret in 1744, which are said to have been confirmed by this letter from Lord Chesterfield, cannot have meant more than the letter expresses.

And it is manifest, by the above extract from Monsieur Andrié's letter to his Prussian Majesty, that, in May 1747, Monsieur Andrié himself understood, that goods of the enemy, taken on board neutral ships, ought to be condemned as prize.

It is evident, from authentic acts, that the subjects of Prussia never understood that any new right was communicated to them.

Before the year 1746, the Prussians do not appear to have openly engaged in covering the enemy's property.

The men of war and privateers could not abstain from captures, in consequence of Lord Carteret's verbal assurances in 1744; because they never were, nor could be known; and there was no occasion to notify them, supposing them only to promise impartial justice: For all ships of war were bound to act, and Courts of Admiralty to judge, according to the law of nations and treaties.

Till 1746, the Prussian documents were a certificate of the Admiralty upon the oath of the builder, that the ship was Prussian built; and a certificate of

the Admiralty, upon the oath of the owner, that the ship was Prussian property.

From 1746 the Prussians engaged in the gainful practice of covering the enemy's goods; but were at a loss in what shape, and upon what pretences, it might best be gone.

On board the ship the 3 Soeurs was found a pass bearing date at Stetin the 6th of October 1746, under the royal seal of the Prussian regency of Pomerania, &c. alleging the cargo, which was ship-timber, bound for Port l'Orient, to be Prussian property, and, in consequence thereof, claiming freedom of the ship.

Claiming freedom to the ship from the property of the cargo, being quite new, the proposition was afterwards reversed; and on board a ship called the Jumeaux, was found a pass, bearing date at Stetin, the 27th of June 1747, under the Royal Seal, &c. alleging the ship to be Prussian property, and, in consequence thereof, claiming freedom to the goods.

But this pass was not solely relied on, for there was also found, on board the same ship, another pass, bearing date at Stetin, the 14th of June 1747, under the Royal Seal, &c. alleging the cargo to be Prussian property.

And it is remarkable that the oaths, upon which these passes were granted, appeared manifestly to be false; and neither of the cargoes to which they relate are now so much as alleged to have been Prussian property in said lists A or B.

It being mentioned, in the said *Exposition des Mo-*

tifs, &c. that Mons. Michell, in September 1747, made verbal representations to Lord Chesterfield, in respect to the cargo taken on board the said ship called the 3 Soeurs, which was claimed as Prussian property; and no mention being made in lists A and B of the said cargo, we directed the proceedings in that cause to be laid before us, where it appears in the fullest and clearest manner from the ship-papers and deposition, that the cargo was timber, laden on the account, and at the risk of Frenchmen, to whom it was to be delivered at Port l'Orient, *they paying freight according to charter-party.* That the Prussian claimant was neither freighter, lader, or consignee, and had no other interest or concern in the matter, than to lend his name and conscience; for he swore that the cargo was his property, and laden on or before the 6th of October 1746; and yet the ship was then in ballast, and the whole of the cargo in question was not laden before May 1747.

Several other Prussian claims had, in like manner, come out so clearly to be merely colourable, that Mons. Andrié, from his said letter, 29th May–9th June 1747, appears to have been ashamed of them.

Third Proposition.—That Lord Carteret, in his said two conversations, specified in your Majesty's name what goods should be deemed contraband.

Answer.—The fact makes this question totally immaterial, because no goods condemned as contraband, or which were alleged to be so, are so much as now suggested to have been Prussian property in the sa[illegible]

lists A and B; and, therefore, whether as enemy's property or contraband, they were either way rightly condemned; and the bills of lading being false, the ships could not be entitled to freight.

But, if the question was material, the verbal declarations of a minister in conversation, might shew what he thought contraband by the law of nations; but never could be understood to be equivalent to a treaty, derogating from that law.

All the observations upon the other part of these verbal declarations hold equally as to this.

Fourth Proposition.—That the British ministers have said, that these questions were decided according to the laws of England.

Answer.—They must have been misunderstood; for the law of England says, that all captures at sea as prize, in time of war, must be judged of in a Court of Admiralty, according to the law of nations, and particular treaties, where there are any.

There never existed a case where a Court, judging according to the laws of England only, ever took cognizance of prize.

The property of prizes being given, during the last war, to the captors, your Majesty could not arbitrarily release the capture, but left all cases to the decision of the proper courts, judging by the law of nations and treaties, where there were any; and it never was imagined that the property of a foreign subject, taken as a prize on the high seas, could be affected by laws peculiar to England.

Fifth Proposition.—That your Majesty could no more erect tribunals for trying these matters than the King of Prussia.

Answer.—Each Crown has, no doubt, an equal right to erect Admiralty Courts, for the trial of prizes taken by virtue of their respective commissioners; but neither has a right to try the prizes taken by the other, or to reverse the sentences given by the other's tribunal. The only regular method of rectifying their errors is by appeal to the Superior Court.

This is the clear law of nations, and, by this method, prizes have always been determined, in every other maritime country of Europe, as well as England.

Sixth Proposition.—That the sea is free.

Answer.—They who maintain that proposition in its utmost extent, do not dispute but that when two powers are at war, they may seize the effects of each other upon the high seas, and on board the ships of friends: Therefore that controversy is not in the least applicable upon the present occasion.*

Seventh Proposition.—Great Britain issued reprisals against Spain on account of captures at sea.

Answer.—These captures were not made in time of war with any power.

* This appears from Grotius in the passages above cited, lib. 3. cap. 1. sect. 5. nu. 4. in his notes. And lib. 3. cap. 6. sect. 6. in his notes.

They were not judged of by the Courts of Admiralty according to the law of nations and treaties, but by rules, which were themselves complained of, in revenue courts. The damages were afterwards admitted, liquidated at a certain sum, and agreed to be paid by a convention, which was not performed. Therefore reprisals issued, but they were general. No debts due here to Spaniards were stopped; no Spanish effects here were seized. Which leads to one observation more.

The King of Prussia has engaged his royal word to pay the Silesia debt to private men.

It is negotiable, and many parts may have been assigned to the subjects of other powers. It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done; a private man lends money to a prince, upon the faith of an engagement of honour, because a prince cannot be compelled, like other men, in an adverse way, by a Court of Justice. So scrupulously did England, France, and Spain adhere to this public faith, that, even during the war, they suffered no inquiry to be made, whether any part of the public debts was due to the subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours.

This loan to the late Emperor of Germany, Charles VI, in January 1734–5, was not a state-transaction, but a mere private contract with the lenders, who advanced their money upon the Emperor's obliging

himself, his heirs and posterity, to repay the principal with interest, at the rate, in the manner, and at the times in the contract mentioned, without any delay' demur, deduction, or abatement whatsoever; and, lest the words and instruments made use of should not be strong enough, he promises to secure the performance of his contract, *in and by such other instruments, method, manner, form, and words, as should be most effectual and valid, to bind the said Emperor, his heirs, successors and posterity,* or as the lenders should reasonably desire.

As a specific real security, he mortgaged his revenues, arising from the duchies of Upper and Lower Silesia, for payment of principal and interest, and the whole debt, principal and interest, was to be discharged in the year 1745. If the money could not be paid out of the revenues of Silesia, the Emperor, heirs and posterity, still remained debtors, and were bound to pay. The eviction or destruction of a thing mortgaged, do not extinguish the debt, or discharge the debtor.

Therefore the Empress-Queen, without the consent of the defenders, made it a condition of her yielding the duchies of Silesia to his Prussian Majesty, that he should stand in the place of the late Emperor in respect of this debt.

The seventh of the preliminary articles, between the Queen of Hungary and the King of Prussia, signed at Breslau, the 11th of June 1742, is in these words: " Sa Majesté le Roi de Prusse se charge du seul payement de la somme hypothéquée sur la Sile-

sie, aux marchans Anglois, *selon le contract signé à Londres, le 7me de Janvier*, 1734–5."

This stipulation is confirmed by the ninth article of the treaty between their said Majesties, signed at Berlin, the 28th of July 1742.

Also renewed and confirmed by the second article of the treaty between their said Majesties, signed at Dresden, the 25th of December 1745.

In consideration of the Empress-Queen's cession, his Prussian Majesty has engaged to her that he will pay this money *selon le contract*, and consequently has bound himself to stand in the place of the late Emperor in respect of this money, to all intents and purposes.

The late Emperor could not have seized this money, as reprisals, or even, in case of open war between the two nations, because his faith was engaged to pay it, without any *delay*, *demur*, *deduction* or *abatement whatsoever*. If these words should not extend to all possible cases, he had plighted his honour to bind himself by any other form of words, more effectually to pay the money: and therefore was liable, at any time to be called upon, to declare expressly, that it should not be seized as reprisals, or in case of war, which is very commonly expressed when sovereign princes or states borrow money from foreigners. Therefore supposing, for a moment, that his Prussian Majesty's complaint was founded in justice and the law of nations, and that he had a right to make reprisals in general, he could not, consistent with his engagements to the Empress-Queen, seize

this money as reprisals. Besides, this whole debt, *according to the contract*, ought to have been discharged in 1745. It should, in respect of the private creditors, in justice and equity, be considered as if the contract had been performed; and the Prussian complaints do not begin till 1746, after the whole debt ought to have paid.

Upon this principle of natural justice, French ships and effects, wrongfully taken after the Spanish war, and before the French war, have, during the heat of the war with France, and since, been restored by sentence of your Majesty's courts to the French owners. No such ships or effects ever were attempted to be confiscated as enemies' property here during the war; because, had it not been for the wrong first done, these effects would not have been in your Majesty's dominions. So, had not the contract been first broke, by non-payment of the whole loan in 1745, this money would not have been in his Prussian Majesty's hands.

Your Majesty's guarantee of these treaties is entire, and must therefore depend upon the same conditions upon which the cession was made by the Empress-Queen.

But this reasoning is, in some measure, superfluous; because, if the making any reprisals upon this occasion be unjustifiable, which we apprehend we have shewn, then it is not disputed but that the non-payment of this money would be a breach of his Prussian Majesty's engagements, and a renunciation, on his part, of those treaties.

All which is most humbly submitted to your Majesty's royal Wisdom.

GEO. LEE.
G. PAUL.
D. RYDER.
W. MURRAY.

January 18. 1753.

TRANSLATION of Mr PETER TRAPAUD's Declaration of his having made satisfaction to the Prussians for the Damage received by the Ship St John, No. 16. in List A.

IN the Exposition which his Prussian Majesty has published, of such ships of his subjects as were taken by the English in the last war, I have observed in the list A, No. 16. that the ship St John, John Grosse, captain, is therein mentioned as having received some damages to the prejudice of the Prussian owners. As the fact is known to me, as I was the sole owner of her cargo, I do hereby, as such, testify the truth, for the satisfaction of all whom it may concern. And I cannot conceive how the Prussian subjects dare demand an indemnification, which they have already more than received, as I am going to convince them.

In the month of November 1747, I ordered the said ship to be freighted at Bourdeaux, and loaded at Libourne with 158¾ tons of white wine. On the 1st of December following that ship put out to sea; on the 11th of the said month she got as far as the

Downs, where she was met by an English privateer, called the Prince of Orange, who sent six of his men on board the Prussian ship, and had the Prussian pilot brought on board him, with the ship-papers and documents, in order to their being examined. On the 12th of the said month, as she lay at an anchor, a great storm arose from the west-south-west, which obliged the Prussian captain, with the consent of his crew, and of the six Englishmen, who were then on board his ship, to cut his cable, in order to drive off to sea. The ship got afterwards into Browershaven inlet, in Holland, on the 15th of the said month of December, without any other damage than the loss of part of her cable, and of an anchor, and arrived at Rotterdam the 21st of the said month. All this is proved by thedeclaration of both the captain and his crew, made on the 4th of January 1748, before Jacob Bremer, notary-public in Rotterdam; and, afterwards sworn to on the 6th of the said month, before the Commissioners of the Chamber of Maritime Affairs.

After the ship was unloaded, the captain gave in to me his account for gross average, consisting of the following articles.

1. For the loss of his cable and anchor.

2. For the maintaining, during eight days, the six men who had been put on boardhis ship by the English privateer.

3. For a passport I procured for him from the Prussian envoy at the Hague, which cost three or four florins.

I paid him, for my share, in that gross average 704 florins, Holland currency, over and above 105 florins which I gave Captain Grosse as a present; and 10 florins 10 stivers I gave as a present to the crew of his ship. Besides all this, it cost me 20 florins or thereabouts in England, which Messrs Simond (brothers) had disbursed, by my order, for the Prussian pilot, who remained on board the privateer after the storm had parted them.

Those who understand the navigation and fitting out of ships, must allow that the Prussian owners will find themselves more than reimbursed for all their pretensions, by means of the 839 florins 10 stivers, Holland currency, which I have paid them, and that they cannot, with any foundation, make any other demands.

All that I have alleged above can be verified by authentic vouchers, (except the presents or gratuities to the captain and his crew, amounting to 113 florins 10 stivers, for which I took no receipt.) In witness whereof, I have signed this present declaration,

PETER TRAPAUD *jun.*

Rotterdam, January 30. 1753.

LETTER A.

SPECIFICATION

OF

PRUSSIAN SHIPS

TAKEN ON THE HIGH SEAS,

AGAINST THE RULES ESTABLISHED BY THE LAW OF NATIONS, UNJUSTLY DETAINED, AND AFTERWARDS RELEASED BY THE ENGLISH MARINE, DURING THE LAST WAR;

AND

THE CAPTURES AND DETAINMENTS WHEREOF HAVE CAUSED LOSSES AND DAMAGES TO THE SUBJECTS OF HIS PRUSSIAN MAJESTY, EITHER FOR THE SHIPS THEMSELVES, OR FOR THE EFFECTS AND MERCHANDISE LADEN UPON THEM.

No. of Ships.	Names of the Ships and Captains.	Names of the English Privateers who took them.	Voyages in which the Capture was made.	Date of the Capture, and Time of Detainment.	Names of the Prussian Subjects who suffered Damages thereby.	Upon what Account, and what Sorts of Merchandise.
1.	The Frederic Friendship, Capt. Sprenger.	The Postilion of Topsham, Captain John Morgan.	From Bourdeaux to Stetin.	Taken Apr. 16. 1748, till May 1. 1748.	Tornicke and Pingel of Stetin.	Account of detainment of the ship.
2.	The Twins, Capt. Kruth.	The Prince Frederick, Capt. Norris.	From Stetin to Port L'Orient or Brest.	Taken Aug. 12. 1747, detained 10 months.	Vanselow of Stetin.	Account of detainment of the ship.
3.	The Anne Elizabeth, Capt. Daniel Shultz.	1. The Salamander, Capt. Henry Staffield. 2. The Dolphin, Captain Henry Pierce.	From France to Stetin.	Taken Jan. 7. 1748, detained 6 months.	1. Schultz of Stetin. 2. The Widow Schroeder.	1. For a cargo of wine and chestnuts. 2. Account of the ship itself.
4.	The Catharine Christiana, Capt. Frederick Berend.	The Prosperous, Captain Solomon Courier.	From Bourdeaux to Stetin.	Taken April 5. 1748 detained 4 days.	Barthold of Stetin.	Account of detainment of the ship.
5.	The Dame Juliana, Capt. Martin Prest.	The Prince of Orange, Captain John Stevenson.	From Leghorn to Amsterdam.	Taken Jan. 20. 1748, detained 5 months.	Barthold of Stetin.	Account of detainment of the ship.
6.	Frederick II. King of Prussia, Capt. Christian Shultze.	The Endeavour, Captain Robert Crousewall.	From Bourdeaux to Konigsberg.	Taken April 4. 1748, detained 4 months.	1. Saturgus of Kon. 2. Bishoff and Maas of Konigsberg. 3. Sherres of Kon.	1. Acc. wines and brandy lad. thereon. 2. Acc. det. of ship. 3. Account of wine.
7.	The ship Good-Wind, Capt. Michael Jurianzen.	Captain Abraham Broxell.	From Morlaix to Roterdam.	Taken April 5. 1748, detained 3 months.	Dickman and Son of Konigsberg.	Account of detainment of the ship.
8.	The Golden Sun, Capt. Jacob Rider.	The Sacville, Capt. Peter Wood.	From Konigsberg to Bourdeaux.	Taken Dec. 29. 1747, detained 5 months.	The Widow of Shurt Lewis of Konigsberg.	Account of detainment of the ship.
9.	The De Daageroud, Capt. Martin Sperwien.	The Endeavour, Captain Robert Crousewall.	From Roterdam to Bayonne.	Taken Mar. 26. 1748, detained 8 months.	The Widow of Shurt Lewis of Konigsberg.	Account of detainment of the ship.

10.	The Frederick II., King of Prussia, Captain Christian Shultz.	The Eagle, Captain John Baseley.	From Konigsberg to Bourdeaux.	Taken Nov. 16. 1746, detained till July 17. 1747.	Bischoff and Maas of Konigsberg.	Account of the ship itself.
11.	The Golden Eagle, Capt. Onne Arends.	The Prince of Orange, Captain John Stevenson.	From Dunkirk.	Taken July 24. 1747, detained 4½ months.	Onne Arends of East Friezeland.	Account of detainment of the ship.
12.	The Two Brothers, Capt. Jon. Hallen.	The York, Captain Gravener. The Saltash, Capt. John Knight.	From Roterdam to Roan.	Taken April 16. 1748, detained 4 months.	The Widow of John Hallen of East Friezeland.	Account of detainment of the ship.
13.	The Young Andrew, Capt. Henry Barkhorn.	The Mary Galley, Capt. Peter Oliver.	From Dublin to France.	Taken Sept. 9. 1747, detained 3½ months.	Espanhiac and Cabrit of Konigsberg.	Account of the ship and a lading of turf.
14.	The Dorothy Sophia, Capt. Peter Kettelhut.	1. The Eagle, Capt. Batzely. 2. The York, Capt. Gravener.	From Bourdeaux to Roterdam.	Taken Dec. 10. 1745, detained till August 12. 1746.	Löper, privy-counsellor, and Sherenberg, counsellor of commerce at Stetin.	Account of detainment of the ship.
15.	The Two Brothers, Captain Augustine Augustinus.	The King-Fisher, Captain William Salterwillett.	From Roterdam to Ostend.	Taken July 26. 1747, detained till Jan. 27. 1748.	Augustin Augustinus of East Friezeland.	Account of detainment of the ship.
16.	The St John, Capt. John Grose.	1. The Prince of Orange. 2. The King of Sardinia, Capt. Torman.	1. From Leghorn to Roterdam. 2. From Bayonne to Roterdam.	1. Taken Dec. 11. 1747, till Dec. 20. 1747. 2. Taken April 30. 1748, till May 29.	Jon Frederick Peters of Stetin. Sherenderg, counsellor of commerce.	Account of detainment of the ship. Account of detainment of the ship.
17.	The Young Tobias, Capt. Paul Otto.	The Corrival, Capt. John Milton.	From Bourdeaux to Dantzic.	Taken May 15. 1748, detained 7 days.	Kretchmar, merchant, Paul Otto, Capt. of the ship, and Ghor of Stetin.	Account of detainment of the ship, and of its lading of wine and brandy.
18.	The Little David, Captain Michael Bughdall.	The Hawk, Capt. Bulkeley. The Warren Galley, Capt. Ryan Brown.	From Bourdeaux to Dunkirk.	Taken May 17. 1748, till Sept. 27. 1748.	Splittgerber and Daun of Berlin.	

LETTER B.

SPECIFICATION

OF THE

NEUTRAL SHIPS,

TAKEN AND UNJUSTLY DETAINED,

AGAINST ALL THE LAWS OF NATIONS, BY THE ENGLISH MARINE, AND AFTERWARDS RELEASED DURING THE LAST WAR,

AND OF WHICH

THE CAPTURE AND DETAINMENTS HAVE OCCASIONED LOSSES AND DAMAGES TO THE SUBJECTS OF HIS MAJESTY THE KING OF PRUSSIA, FOR THE MERCHANDISE WITH WHICH THEY WERE LADEN, AND WHICH WERE DETAINED IN ENGLAND, ALTHOUGH AT LENGTH RELEASED.

No. of Ships.	Names of the Ships and Captains.	Names of the English Privateers who took them.	Voyages in which the Capture was made.	Date of the Capture and Time of Detainment.	Names of the Prussian Subjects who suffered Damages thereby.	Upon what Account, and of what Sorts of Merchandise.
1.	A Dane, the Cecilia, Capt. Bois Swensen.	The Chesterfield, Capt. Samuel Gilbeck.	From Ceüta to Altena.	Taken April 22. 1748, detained till June 11. 1748.	Palmir and Le Cocq of Berlin.	For a Cargo of Wine.
2.	A Swede, the Nahring, Capt. Christian Tiedeman.	The Cumberland, Captain Henry Cooper.	From Rochelle to Bourdeaux.	Taken Oct. 13. 1747, detained 6½ months.	1. Le Cocq of Berlin. 2. The Schwartz Brothers of Magdeburgh. 3. Sandrat and Hammel of Magdeburgh. 4. Meurin of Berlin.	1. For 3 Barrels of Indigo. 2. For 2 Barrels of Indigo. 3. For Indigo, Sugar, and Orléane. 4. For Indigo.
3.	The Lady Jane, C. Joachim Peyn.	The Fortune, Capt. Gilbert Chain.	From Hamburgh to Cadiz.	Taken March 17. 1747, detained 6 months.	1. Mentzel of Hirtschbergh. 2. The Widow of John Martin Gottfnid, and her Son-in-law, of Hirschbergh.. 3. The Widow of Buchs and Son, of Hirschbergh. 4. Splittgerber and Daun of Berlin.	1. For 3 Bales of Linens. 2. For Linens. 3. For ditto. For ditto.
4.	A Swede, the Carlshaven Werft, or Carlshaven Dock, Capt. John Holm.	The Lily, Captain Thos. Knowles.	From Hamburgh to Cadiz.	Taken Dec. 24. 1747, detained 1 year.	1. Mentzel of Hirschbergh. 2. The Widow of John Martin Gottfried, and Son-in-law of Hirschbergh. 3. The Widow and Son of Godfrey Glatfy of Hirschbergh. 4. Hartman of Hirschbergh. 5. Schober of Hirschbergh.	1. For 7 Chests of Linens. 2. For Linens. 3. For ditto. 4. For ditto. 5. For ditto.

No. of Ships.	Names of the Ships and Captains.	Names of the English Privateers who took them.	Voyages in which the Capture was made.	Date of the Capture, and Time of Detainment.	Names of the Prussian Subjects who suffered Damages thereby.	Upon what Account, and of what Sorts of Merchandises.
					6. Buttner of Schmiedebergh.	6. For Linens.
					7. Splittgerber and Daun of Berlin.	7. For Flax and Tin.
5.	A Hamburgher, the Anne Elizabeth, Captain Christian Man.	The Carlisle, Capt. William Owen.	From Hamburgh to Cadiz.	Taken Sept. 10. 1746, detained 6½ months.	1. The Widow of John Martin Godfried, and Son-in-law of Hirschbergh.	1. For Linens.
					2. The Widow and Son of Gotfrey Glatfy of Hirschbergh.	2. For ditto.
					3. John Hartman of Hirschbergh.	3. For ditto.
					4. Splittgerber and Daun.	4. For ditto.
6.	A Swede, Gustavus the Prince-Royal, Captain Barthold Muhl.	The Anson, Capt. Benjamin Goodwin.	From Hamburgh to Cadiz.	Taken Oct. 27. 1747, detained 15 months	1. The Widow of John Martin Gotfried, and Son-in-law of Hirschbergh.	1. For Linens.
					2. Widow and Son of Godfrey Glatfey of Hirschbergh.	2. For ditto.
					3. Hartman of Hirschbergh.	3. For ditto.
					4. Tietze of Hirschbergh.	4. For ditto.
					5. Cuenz of Hirschbergh.	5. For ditto.
					6. Carpzow of Hirschbergh.	6. For ditto.
					7. Splittgerber and Daun of Berlin.	7. For Flax.
7.	A Dane, the Young Benjamin, Capt. Henry Neuschilling.	The Prosperous, Captain Solomon Courier.	From Hamburgh to Cadiz.	Taken June 2. 1747, detained 6 months.	1. The Widow and Son of Godfrey Glatfey of Hirschbergh.	1. For Linen.

					2. Christopher Cruentz of Hirschbergh.	2. For Linen.
8.	The Prince Frederick, C. John Hartmann.		From Hamburgh to Bilboa and Bayonne.	Taken May 28. 1748, detained 1½ month.	The Widow and Son of Godfrey Glatfey of Hirschberg.	For Linen.
9.	A Hollander, the Mary Joseph, C. Jeurier Rouge.	The Anson, C. Benjamin Goodwin.	From Hamburgh to Cadiz.	Taken Sept. 21. 1747, detained 10 months.	John Godfrey Bultner of Schmiedebergh.	For Linen.
10.	A Hamburgher, the Union, C. John Struckman.	The Culloden, C. Abraham Boxel.	From Bourdeaux to Hamburgh.	Taken August 9. 1747, detained 3 months.	1. The Schwartz Brothers of Magdeburgh.	1. For Coffee.
					2. Sandrad and Hummel of Magdeburgh.	2. For Sugar and Coffee.
11.	A Hamburgher, the Neptune, C. Sander Heeren.	The Hardwick, C. James Samian.	From Nantz to Hamburgh.	Taken Aug. 10. 1747, detained 5 months.	1. The Schwartz Brothers of Magdeburgh.	1. For Coffee.
					2. Sandrad and Hummel of Magdeburgh.	2. For Coffee, Sugar and Pernambuco.
12.	A Flemburgher, the St Paul, C. Jent Hinrischen.	The Chesterfield, C. Samuel Gilbeck.	From Nantz to Hamburgh.	Taken April 5. 1748, detained 1½ month.	The Schwartz Brothers of Magdeburgh.	For Coffee.
13.	The Crown, C. Peter Classen.	The Prince of Orange, Captain John Topman.	From Nantz to Hamburgh.	Taken Oct. 25. 1747, detained till Jan. 2. 1748.	1. Eberspach of Berlin.	1. For Indigo.
					2. The Sons of Feyerisen, and Siebert of Glogaw.	2. For ditto.
14.	The Lady Catherine, C. Wilke of	The Tartar, Capt. Thomas Spicer.	From Rochelle to Altena.	Taken April 5. 1748, detained 7 months.	1. Spatzier and Englehart of Berlin.	1. For Brandy.
					2. The Widow Reyne of Berlin.	2. For ditto.
					3. Matthis of Berlin.	3. For ditto.
15.	The Concord, Captain Claes Eichels.	The George, Capt. William Freebairn.	From Rochelle to Hamburgh.	Taken Nov. 21. 1747, detained 6 months.	1. Gillet of Berlin.	1. For Syrup and Brandy.
					2. Grand of Berlin.	2. For Syrup and Brandy.
					3. Schneiderhints of Berlin.	3. For Syrup.

No. Ships.	Names of the Ships and Captains.	Names of the English Privateers who took them.	Voyages in which the Capture was taken.	Date of the Captures and Time of Detainment.	Names of the Prussian Subjects who suffered Damages thereby.	Upon what Account, and of what sorts of Merchandise.
16.	The Jane, Captain Gerard Royer Altag.	The Culloden, Capt. Abraham Boxel.	From Charente to Hamburgh.	Taken Aug. 7. 1747, detained 1 year.	1. The Widow Reyne of Berlin. 2. Schuler and Reyne of Berlin.	1. For Brandy. 2. For ditto.
17.	A Hamburgher, the Friendship, Capt. John Quimann.	The George, Capt. William Freebairn.	From Rochelle to Hamburgh.	Taken Aug. 10. 1747, detained 3 months.	Sandrat and Hummel of Magdeburgh.	For Indigo.
18.	A Dane, the Young Prince Christian, Capt. John Cornelius Leuwen.	The Endeavour, Captain Robert Crousewall.	From Marseilles to Hamburgh.	Taken Sept. 12. 1747, detained till January 2. 1748.	1. Sandrat and Hummel of Magdeburgh. 2. Matthis of Berlin.	1. For Coffee, Safron, and Verdigrease. 2. For Almonds.
19.	The Lady Margaret, Capt. Henry Bielenberg.	The Culloden, Capt. Abraham Boxel.	From Bourdeaux to Hamburgh.	Taken Aug. 29. 1747, detained 3½ months.	1. Beker of Colberg. 2. Schneiderhuntz of Berlin. 3. Weisback of Potsdam.	1. For Indigo. 2. For Wine, Vinegar & Brandy. 3. For Coffee.
20.	A Hamburgher, the Rose-bush, Capt. Peter Classen.	The Endeavour, Captain Robert Crousewall.	From Bourdeaux to Hamburgh.	Taken April 6. 1748, detained 3 months.	1. Beker of Colberg. 2. Weisback of Potsdam.	1. For Indigo. 2. For Syrup.
21.	A Sonderburgher, the Mary Sophia, Capt. Christ. Giegersen.	The Carlisle, Capt. William Owens.	From Rochelle to Hamburgh.	Taken March 20. 1747, detained 5 months.	Meurer of Berlin.	For Indigo.
22.	The Anna Sophia Capt. Henry Horn de Wolgast.	Capt. Jellers.	From Bourdeaux to Konigsberg.	Taken March 21. 1747, detained 2 days.	Saturgus of Konigsberg.	For Wine and Bayonne Hams.
23.	A Dantzicker, the Hope of Dantzick, Captain Conrad Harlach.	The Chesterfield, Capt. Gilbeck.	From Bourdeaux to Dantzick.	Taken Aug. 17. 1747, detained 7 months.	1. Dickman and Son of Konigsberg. 2. Korn of Konigsberg. 3. Albrecht of Konigsberg,	1. For Prunes. 2. For Wines. 3. For Indigo.

24.	The Young John, of Petersburgh, Captain Thomas Siefers.	The D. Wm. Capt. Richd. Grovenor. The Dolphin, Capt. Thomas Pierce.	From Bourdeaux to Hamburgh.	Taken May 12. 1748, detained 3 months.	1. The Widow of Bucks, and Son of Hirschberg. 2. Weisbach of Potsdam.	1. For Indigo. 2. For Verdigrease.
25.	The Gregory, of Bremen, Captain Jacob Miller.	The St Michael, Captain George Clarmingham.	From Bourdeaux to Hamburgh.	Taken March 19. 1748, detained 2 months.	Maquet and Son of Magdeburgh.	For Brandies, Wines, Oils, Olives, Capers, Almonds.
26.	The Young Catherine, commanded by Captain Kupper, afterwards by Capt. Elkes.	The Culloden, Capt. Abraham Boxel.	From Bourdeaux to Hamburgh.	Taken in May 1747, detained 6 months.	Schniderhintz of Berlin.	For Syrup.
27.	The Six Sisters of Lubec.	The Culloden, Capt. Abraham Bexel.	From Bourdeaux to Lubec.	Taken Oct. 21. 1747, detained 5 months.	Kritting of Konigsberg.	For Indigo.
28.	The St Anne of Hamburgh, Capt. Abr. Peterson.	The George, Capt. William Freebairn.	From Bourdeaux to Hamburgh.	Taken Aug. 11. 1747, detained 3½ months.	Weisbach of Potsdam.	For Brandy.
29.	The Young Eldert, of Hamburgh, Capt. J. Stuven.	An English Privateer.	From Roan to Hamburgh.	Taken May 4. 1748, detained 5 months.	The Widow Schroder of Stetin.	For Wine.
30.	The Just Henry of Hamburgh, Capt. Henry Elkes.	The Culloden, Capt. Abraham Boxel.	From Bourdeaux to Hamburgh.	Taken in July 1747, detained 6 months.	Pompera of Berlin.	For Wines and Brandy.
31.	A Dane, the Elizabeth, Capt. Soreen Peterson.	The Culloden, Capt. Abraham Boxel	From Hamburgh to Roan.	Taken Sept. 17. 1747, detained 8 months.	Splittgerber and Daun of Berlin.	For Copper.
	The Lady Clara, Capt. Hermann Classen, Driest.	The King George, Captain John Harding.	From Hamburgh to Roan.	Taken June 22. 1747, detained 5½ months.	Splittgerber and Daun.	For Wax.
32.	Adolphus Frederick Capt. Jonas de Haspin.	1. Captain Peter Wood. 2. Capt. Richard Gravener.	From Marseilles to Hamburgh.	Taken April 10. 1748, detained 3 months.	The Jew Hertz of Potsdam.	For Goats' Hair and Anchovies.

SUPPLEMENTARY NOTE BY EDITOR.

It may not be uninteresting to the reader to annex the names of some of the publications, connected with the subject of this tract, which appeared subsequent to the controversy arising out of the Silesian arrestment.

The paper warfare between the Maritime Theorists of England, and those of the Continent, was at its height during the period of the Prussian arrest of English property, in the first Silesian war, and the ensuing maritime contest. This work originated in that period, and has since been re-edited as a standard work in this country.

About the same time the learned Hubner produced his work.

1. De la Saisie des batemens neutres, on du droit qu'ont les nations bellegerantes, d'arreter les navires des peuples amis. 2 vols. 8vo. A la Haye 1759; wherein the author defends the principle, "Free ship, free goods."
2. Lee's Treatise on Captures in War. Lond. 1759.
3. Memoire Justicatif de la conduite de la Grande Bretagne en arretant les navires etranges, par M. Marriott, Avocat General de sa Majesté Britannique.

In Germany the most important works of this period are—

4. Essai sur divers sujets de Politique et de Jurisprudence, par Von Steck. 8vo. 1799. And by the same author,
5. Versuch über Handels und Schiff-fahrtsverträge. 8vo. Halle, 1782.

6. August von Hennings Sammlung von Staatschriften, die während des See Krieges von 1776 bis 1783 sovohl von den kriegführenden, als auch von den neuralen Mächten, öffentlich bekannt gemacht worden sind. 2 vols. 8vo. Altona, 1784.
7. Totze, La liberté de la navigation et du commerce des nations neutres pendent la guerre. 8vo. Lond. et Amst. 1780.
8. Galiani Dei doveri dei Principi neutrali verso i Principi guerreggianti e di questi verso i Principi neutrali. 4to. Napoli, 1782.
9. Lampredi Trattado del commercio dei popolo neutrali in tempo di guerra. 2 vols. Fiorenza, 1718.
10. Azuni Sistema universale dei Principii del diretto marittimo d'ell Europa, 1795.

In the commencement of the Revolutionary War, Professor Buesch was the foremost advocate of neutral rights against the belligerents. Among his works is

11. Uber das bestreben der völker neuerer zeit einander in ihrem See handel recht wehe zuthun. 8vo. Ham. 1800.

The paper warfare between England and the Continent was renewed by Prof. Schlegel, upon the occasion of the capture of a Swedish convoy, in his treatise—

12. Sur la visite des batemens neutres. Copenhagen, 1800,—as well as to the following work by Bornemann:—

Uber die gebrauchliche visitation der neutralen Schiffe, und über dei convoi. Copenhagen, 1801.

The following works were produced in opposition to Schlegel:—

13. Croke's Remarks on M. Schlegel's work upon the Vi-

sitation of Neutral Vessels under convoy. 8vo. London, 1801.

14. Ward's Treatise of the Relative Rights and Duties of Belligerent and Neutral Powers in Maritime Affairs. 8vo. London, 1801. And by the same Author,
15. An Essay on Contraband; being a continuation of the Relative Rights, &c. 8vo. Lond. 1801.
16. Letters of Sulpicius on the Northern Confederacy. 8vo. Lond. 1801.—This anonymous writer handles the subject in a masterly manner. The publisher of these Tracts intends to include them in his collection.

Denmark during this period produced—

17. Versuch einer darstellung des Dänischen neutralitäts-Systems während des letzteren Seekrieges. By Dr C. F. Von Schmidt Phiseldeck. 8vo. 4 parts. Copenhagen, 1802.

Among the works of the Danish authors, who prefer the principle of the Consulate to the principle "free ships, free goods," the following is the most important:—

18. Tetens, Considerations sur les droits reciproques des Puissances belligerantes et des Puissances neutres sur mer, avec les principes du droit de guerre en generale. 8vo. Copenhague, 1805.

The contrary principle is defended by—

19. Jouffroy, Les droits des gens maritimes universal, ou essai d'un systeme general des obligations reciproques des toutes les Puissances, relativement à la navigation et au commerce maritime. 8vo. Berlin, 1806.
20. Rayneval, De la liberté des mers. 2 vols. 8vo. Paris, 1801.

The Contest between England and America, as to the continuity of a voyage, occasioned the pamphlet of Mr Stephen :—

21. War in disguise ; or the frauds of the neutral flags. 8vo. Lond. 1806. To which the following was published in answer.
22. An Answer to War in disguise, or remarks upon the new doctrine of England concerning neutral trade. New York. This answer was imputed to Governor Morris.
23. La Paix en Amerique, Reponse à l'ecrit intitulé, La Guerre deguissée, ou considerations politiques sur les veritables interests de la Grande Bretagne, relativement aux Puissances neutres. 8vo. Lond. 1808.
24. An Examination of the British doctrine which subjects to Capture a neutral trade, not open in time of peace.
25. A Letter from the Minister Plenipotentiary of the United States, to Lord Mulgrave, late Secretary of State for Foreign Affairs.
26. American arguments for British rights ; being a republication of the celebrated Letters of Phocion on the subject of neutral trade.
27. Martens, M. de, Essay on Privateers, Captures, and particularly Re-captures,—translated from the French by Thomas Hartwell Horne. 8vo. Lond. 1801.
28. Jacobsen's Handbuch des practischen Seerechts der Engländer und Franzosen.
29. Marten's Erzälung merckwürdiger fälle des neueren Europaischen Volkerrechts. 2 vols. 8vo. Götting. 1802–4.

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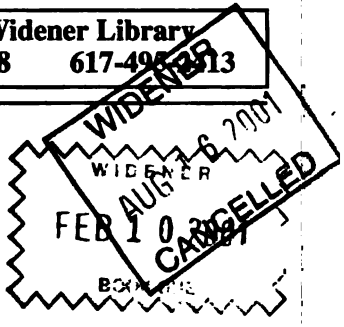

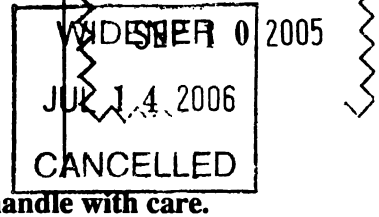

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